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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

RONALD COULTER AND ANISSA COULTER, et al.,

Petitioners,

SHERRY HORTON, et al.,

Plaintiffs-Respondents,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do judicial comity, States' sovereignty, and the McCarran-Ferguson Act preclude a United States District Court from regulating insurance sales in and among the several states by approval of a settlement of a Federal class action suit?

PARTIES TO THE PROCEEDING

The petitioners in this case are Ronald Coulter, Anissa Coulter, Douglas Connor; Roena Connor; Darrin Johns; Joann Kablach; Eric Maharg; Terrance McConnell; Deborah Myers; Terry Palmer; Marjorie Palmer; Brian Rohm; James Romano; Mary Romano; Albert Darren Wise; Jeanne Yokel; Edward Beliunas; Paulette Beliunas; John Brooks; Stephanie Charles; Shelly A. Daughenbaugh; Jerilyn Freiwald; Nina Heathcote; Daniel Heathcote; Robert W. Hemcher; Kenneth D. Johnson; Michele R. Johnson; Frieda E. Kamel; Jerome J. Knorr; Enod S. Knorr; George Liptak; Ruth Liptak; Kenneth J. Magnes; Sandra Marie McCue; Mark A. Ondrusek; Ernestine Peterson; Rori K. Rasel; Clarence Ridgeway; Emily N. Riehl; Joan C. Valenta; Robert Dale Wiles; and Catherine Wiles. All other parties to the instant proceeding are set forth in the caption on the cover of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ronald Coulter and Anissa Coulter, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The reported opinion of the court of appeals (App. 4a) is reported at 78 F3d 1533 (11th Cir. 1996). The opinion of the district court (App. 83a [pages omitted]) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 2, 1996 (App. 4a), and a timely petition for rehearing was denied on May 15, 1996 (App. 44a). An extension until September 13, 1996 for the filing of this writ was granted on (App. 75a). A second petition for rehearing was denied on August 19, 1996 (App. 44a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

This case involves the avoidance of an irreconcilable confrontation between the Congress of the United States and the Supreme Court of the United States over the sovereignty of the States as expressed by the Congress of the United States in the passage of the McCarran-Ferguson Act.

Presently, there are two Multi-District Litigation Panels specifically addressing fraudulent insurance sales practices handling nationwide class actions, numerous nationwide class actions filed against numerous insurance companies, other than the two defendants in the M.D.L.s, and scores of individual cases filed in federal courts across the country, all alleging fraudulent sale practices of insurance agents. These cases encompass hundreds of thousands of individuals who have been defrauded, with claims worth hundreds of millions of dollars. All of these cases are impacted upon by the model created by the decision of the United States Court of Appeals for the Eleventh Circuit in the instant case, which ignores the mandates of the regulation of the business of insurance as set forth by Congress in the McCarran-Ferguson Act.

The United States District Court for the Middle District of Florida, Tampa Division and the United States Court of Appeals for the Eleventh Circuit, (hereinafter Eleventh Circuit) in the instant case, have placed the powers of the several States to regulate the business of insurance, in jeopardy, by decision contrary to the plain meaning of the McCarran-Ferguson Act, restricting the

federal regulation of the business of insurance, which is to be done by the individual states. (App. 83a) Metropolitan Life Insurance Company's sales office in Tampa, Florida was engaged in the sale of retirement plans to nurses on a nationwide basis. The problem was that the retirement plans sold to the nurses, were not retirement plans, they were whole life insurance policies. The Tampa based Metropolitan agents did not disclose to the nurses that they were actually receiving life insurance. They specifically did not even mention the word insurance during the sales' presentation of the retirement plan. (App. 58a-59a)

Additionally, other sales offices throughout the United States, including Pennsylvania, were involved in other fraudulent insurance sales practices, which included the replacement of policies, selling of retirement plans, selling of savings plans, selling college education savings plans, all for the purpose of the agents making a commission, not for legal, proper insurance needs and purposes.

Specifically, in the spring of 1991, Pennsylvania licensed Metropolitan agents began selling various retirement and savings plans to Pennsylvania citizens. Factually distinct from how the Florida agents sold the nurses retirement plans, is that the Pennsylvania agents disclosed to the purchasers that there was an insurance component to the retirement/savings plan. Accordingly, the consumers expected to receive a life insurance policy as part of the retirement plan. (App. 59a)

Thus, when they had a medical check-up, were given a blood test and received a life insurance policy, they were not surprised, because that was a part of the entire "deal" that was offered by the Pennsylvania Metropolitan agents.

In the Commonwealth of Pennsylvania, Pennsylvanian licensed Metropolitan agents sold to Pennsylvania citizens policies that had allegedly been approved by the Pennsylvania Insurance Commission. Between 1991 and 1993, Metropolitan sold several

hundred thousand life insurance policies in Pennsylvania that were not pre-approved by the Pennsylvania Insurance Commission, and when reviewed, were found not to comply with the requirements of the Insurance Commission. (App.intervention)

The Pennsylvania Insurance Commission conducted a Market Conduct Survey on the sales practices of Metropolitan Life in the Commonwealth of Pennsylvania and found Metropolitan in direct violation of Pennsylvania Insurance Law and fined Metropolitan for the violations. Additionally, the Insurance Commissioner directed Metropolitan to make restitution to the Pennsylvania citizens who had been defrauded. (App. 103a) This includes the Pennsylvania members of the Horton class, as well as the Petitioners herein. There was no limitation placed upon the Pennsylvania Metropolitan policyholders, as required in Horton.

To establish federal jurisdiction, the Horton court based its jurisdiction on federal question jurisdiction pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO). (App. 10a, 34a)

How a federal district court came to entertain a nationwide class action involving alleged misrepresentations in the sale of insurance company products is a mystery? The case apparently began with a RICO claim to establish jurisdiction, but RICO clearly does not apply to the business of insurance, since it is silent on the subject. Surely, filing of a faulty RICO suit should not give rise to a nationwide class action suit against an insurance company in the teeth of the McCarran-Ferguson Act.

The Pennsylvania Plaintiffs had filed a class action suit against Metropolitan Life Insurance Company in a Pennsylvania State Court, as would seem to be proper under the McCarran-Ferguson Act. The Pennsylvania Plaintiffs also filed a motion for intervention in Horton, (App.intervention) requesting that a subclass be created for the Pennsylvania residents, or in the alternative that the Pennsylvania residents be severed from the

nationwide class action suit in the Federal District Court for the Middle District of Florida, Tampa Division. This motion was denied.

Instead, the District Court approved a negotiated class certification which embraced putative class members in every State of the Union, regardless of the insurance regulatory laws of the several States. (App. 11a)

The Pennsylvania Plaintiffs appealed this case to the Eleventh Circuit, (App. 4a) which denied the appeals and, without notice or hearing, sanctioned the Pennsylvania Plaintiffs, branded the appeals as "frivolous" and imposed double costs and attorney fees.

1. The Nationwide Class Action and Settlement of Horton. A nationwide class action was filed pursuant to Rule 23 of the Federal Rules of Civil Procedure against Metropolitan Life Insurance Company in Federal Court in Tampa, Florida, Horton, et al. v. Metropolitan in November of 1993, (designated by the 11th Circuit as Grilli, but known to all counsel and the Courts as Horton, hereinafter referred to as Horton). (App. 4a)

Within four months of filing of this nationwide class action, in April 1994, the District Court approved the sending of a Class Notice of Settlement and Proof of Claim Form. Then in July of 1994, held a fairness hearing on the terms of the settlement. (App. 11a)

On October 25, 1994, over the objection of the Petitioners, the District Court approved the settlement class and the terms of the settlement. (App. 11a)

The Petitioners objected to their inclusion in the settlement class, because they requested that their state claims and remedies, available to Pennsylvania residents for the regulation of the business of insurance in Pennsylvania, should be available to them as citizens of Pennsylvania. (App. 101a)

The District Court approved a settlement after a time lapse of only four months in which the only compensation to class members was the refund of premiums plus interest; whereas, the attorney fees awarded to the class counsel were $2,750,000.00 (two million seven hundred fifty thousand dollars). (App. 37a)

2. The Intervention of the Petitioners. How the Petitioners made the District Court aware of their lawsuit filed in Pennsylvania, was through the filing of a petition to intervene, filed in May of 1994. The Petitioners had filed their own statewide class action in Pennsylvania State Court in March of 1994, Coulter v. Metropolitan Life, (hereinafter referred to as Coulter). (App.intervene) Metropolitan, based on diversity of citizenship, then removed the case to the Federal District Court in the Western District of Pennsylvania.

In Coulter it was asserted that Metropolitan violated Pennsylvania statutory laws as well as Pennsylvania common law, which apply to Pennsylvania's right to regulate the business of insurance and to protect its citizens from fraudulent insurance sale practices.

The purpose of the intervention was two-fold, the first was to inform the Federal Court in Tampa of the existence of their case, and the second was to determine if the Federal Court in Tampa would afford the Coulter's any relief based upon their Pennsylvania claims. (App. 101a)

Specifically, the Coulters requested to intervene in Horton to form a subclass of residents in order to insure that these Pennsylvania residents were provided protection afforded to them under the laws of Pennsylvania or in the alternative to exclude themselves as potential class members from the Horton case. (App. 101a)

The District Court, by Order of October 25, 1994, refused to allow intervention on behalf of the Petitioners, to exclude

petitioners as class members, or to create a subclass, even though petitioners had previously commenced a class action suit against Metropolitan Life Insurance Company in the Commonwealth of Pennsylvania, thus showing their intent to proceed on their own. (App. 11a)

The District Court denied the intervention and also approved the exclusion of the Pennsylvania plaintiffs from acting as a subclass representatives, because the Court found there was not any need for subclasses, since no States' laws were applied. (App. 97a)

The District Court also denied the request to opt-out on the basis that it was too late, that it would prejudice Metropolitan, and that it may impair the settlement and orderly disposition of the suit. (App. 83a)

In the District Court's rush to judgment, which only took a few months, the Court approved the nationwide class action and specifically rejected the application of any state law to the claims, and instead applied the law of Federal Class action settlements. (App. 97a)

3. **The Appeal to the Eleventh Circuit.** The Coulter Petitioners, then filed four appeals to the Eleventh Circuit. (One appeal for each order entered denying relief.) The appeals were consolidated for purposes of briefing and argument.

The Eleventh Circuit affirmed the District Court, found the appeal to be frivolous and in contradiction to F.R.A.P. 38, also entered sanctions of attorneys fees and double costs against the Petitioners, without any advance warning by the court, or any motion filed by the Respondents. (App. 18a)

The Petitioners requested rehearing based upon asserted errors of law and fact contained in the Opinion of the Court, which were denied. (App. 46a)

Metropolitan filed a petition requesting clarification as to who would be responsible to pay the attorney's fees and costs. The Court determined that liability would be joint and several for the same. (App. 2a)

Interestingly, on September 4, 1996, two years after the Class Notice and Proof of Claim Form was approved by the District Court, and after the sanction order, Metropolitan has admitted that it did not send the Class Notice and Proof of Claim form to 5,700 members of the class.

One of the named petitioners, Frieda Kamel, specifically had asserted to the District Court that she did not receive a class notice and should not be included in the Horton class. Two years later, after she has been sanctioned by the Eleventh Circuit, along with the rest of the Petitioners, Metropolitan is now admitting that she did not receive notice. Metropolitan heatedly opposed her, and both courts accepted Metropolitan's assertions and rejected Frieda Kamel's assertions. Metropolitan now admits that she was correct from the outset.

Even with the "discovered" other 5,699 members of the Horton class that did not receive notice in 1994, now being admitted of record by Metropolitan, the District Court has not sua sponte appointed a master at Metropolitan's expense to determine the cause of this oversight and to report on the efficacy and diligence of Notification.

The District Court found that Frieda Kamel was a class member and that she had no right to opt-out, even though, as Metropolitan has now pointed out, she never was notified of the right to opt-out, prior to June 13, 1994, the last day that she was allowed to opt-out, pursuant to the District Court's order approving the Class Notice. (App. 83a)

4. The Nationwide Injunction in Horton. The District Court has also enjoined any other litigation in the United States, that might be brought asserting any claims in any court to protect the settlement order -- thereby, regulating the "business of insurance". This may be construed that any whole life insurance policy sold between 1991 and 1993, whether it was sold as a retirement plan, or not, is controlled by the injunction. (App. 77a)

5. Two Petitions for Rehearing before the Eleventh Circuit. After the Opinion of the Eleventh Circuit was published, the Petitioners filed a Petition for Rehearing on the basis of correcting several important factual inaccuracies contained in the opinion of the Court, that if corrected, should have been grounds for the Court to reconsider its position. Amongst others, the Court found the appeal as frivolous, because the there was no legal basis for the actions of the Petitioners. The Petitioners included specific references to the treatise of Newberg and Conti on Class Actions, which recommended the exact actions that the Petitioners had taken. All the Petitioners had done was follow the directions of the treatise, which is considered the bible on class actions, yet the Court found this to be frivolous. Additionally, the issue was also raised that the sanctions were violative of not only the Rules and commentary of the Appellate Rules of Procedure, but that to award them without any prior notice or hearing has been found to be violative of due process. The Court Denied the Petition without comment.

The second Petition for Rehearing was filed based upon the then new decisions of B.M.W. of North America v. Gore, 116 S.Ct. 1589 (1996), (this was a decision on the principles of judicial comity and the sovereignty of the several States), and the Third Circuit's decision in Georgine v. Amchem, 83 F.3d 610 (1996), (the Third Circuit, reviewed the propriety of the procedure in approving settlement classes under Fed.R.Civ.Pro. 23), neither of which was before the Eleventh Circuit at the time it rendered its

Opinion and Order. The issue of McCarran-Ferguson Act and its relation to federal regulation of the business of insurance was also raised. This Petition was also denied without comment.

6. Extension of Time Granted on the Filing Date of this Petition for Allocatur. The Petitioners sought and received from Justice Kennedy an extension of time to file this Petition for Allocatur until September 12, 1996, to afford the Eleventh Circuit the opportunity to review the B.M.W. and Georgine decisions. This extension was granted.

7. The Ruling of the Eleventh Circuit Ignores the Mandate of Congress, Prohibiting the Federal Regulation of the Business of Insurance. The District Court's and the Eleventh Circuit's rulings, unless checked by the Supreme Court of the United States, will cause a confrontation between the Congress of the United States and the Supreme Court of the United States over the authority of the Congress to regulate commerce, "the business of insurance" as expressed in the McCarran-Ferguson Act.

It is critically important for courts, litigants and insurance regulators across the country to know whether the Eleventh Circuit's decision is right or wrong. Under the Eleventh Circuit's rule, insurance companies can avoid the entire regulatory schemes of the several States which were established in reliance to the mandate of Congress via the McCarran-Ferguson Act.

If the Eleventh Circuit is wrong, but its ruling remains unreviewed, the decision will create confusion amongst all of the circuits, including the two Multi-District Litigation Panels which are based upon improper sales tactics of life insurance agents, as well as the numerous nationwide class actions and other cases filed in federal court against other life insurance companies that are looking at these exact same issues and are reviewing the Horton decision as a possible model of how to handle the nationwide class actions. The decision of the Eleventh Circuit, if followed, will destroy the congressional limitations set forth in the McCarran-

Ferguson Act.

In the one M.D.L., located in the Western District of Pennsylvania, the same defendant as in the Horton case is the defendant: Metropolitan Life Insurance. In the other M.D.L. in the District Court of New Jersey, the defendant is Prudential Insurance. Both of the M.D.L.s effect hundreds of thousand of insurance consumers nationwide, as there are several nationwide class actions filed asserting various fraudulent sales schemes.

If the Eleventh Circuit is correct, and its approach is adopted and Horton is allowed to stand, it will be a devastating blow to the state regulation of the insurance industry as we now know it. The insurance companies will now be regulated by federal district courts via federal nationwide class actions. This allows the insurance companies to escape the regulatory schemes and state-by-state scrutiny of the insurance commissioners.

If the Pennsylvania Petitioners/Plaintiffs are deprived of their Pennsylvania claims and remedies, this would be federal preemption in the most extreme form, contrary to the intent of Congress as expressed in the McCarran-Ferguson Act. If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so, "unmistakably clear". This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers of which Congress does not readily intervene or usurp.

In the instant case, the only plain statement made by Congress is that regulation of the "business of insurance" shall be done by the several States.

The District Court in Horton, in denying the relief requested of the Petitioners of Pennsylvania claims and remedies, ordered the settlement of the nationwide class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, specifically finding that the Court was not applying the law of any state, but

rather as to the fairness and adequacy of the settlement was applying "the federal law governing class certification and settlement approval". "... The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles. ..."(App. 97a)

The Petitioners respectfully submit that this series of events adds up to an effort by Metropolitan Life Insurance Company to evade its obligations under the McCarran-Ferguson Act to comply with the regulatory laws of the several States through settlement of a questionable Federal class action suit. This close-to-the-vest settlement denied Pennsylvania plaintiffs of representation among the class representatives and thereby of participation in the negotiations, and also denied them of their choses in action under Pennsylvania law, which permits compensatory, statutory, and punitive damages. These Pennsylvania statutes include the Pennsylvania Unfair Trade Practice and Consumer Protection Law, 73 P.S. §201.1, et seq., and the Pennsylvania Bad Faith Insurance Statute, 42 Pa. C.S.A. §8371.

This Court should grant review to clarify the governing standard and prevent the enormous waste of both judicial, legislative, regulatory and private resources that is the inevitable real world result of the Eleventh Circuit's ruling. It is unknown what will the reaction be in Congress, but it will shake the foundations of our Constitutional system and the separation of powers.

REASONS FOR GRANTING THE PETITION

This case presents the issue of a direct and serious clash between the Congress of the United States and the statutorily created courts of the federal judicial system. It would be fair to say that this case runs to the very foundations of our Constitutional form of government. The case involves federal government regulation of improper practices in the marketing of insurance products, a subject on which this Honorable Court and the

Congress of the United States have taken historic actions.

A decision is required by your Honorable Court to wisely prevent what appears to be an oversight of significant congressional legislation. The McCarran-Ferguson Act directs that the "business of insurance" and the regulation thereof to be the province of the states.

The District Court of the Middle District of Florida, Tampa Division, with the approval of the United States Court of Appeals for the Eleventh Circuit United States Court of Appeals, in a settlement class action order, has ignored the McCarran-Ferguson Act and regulated the sale of insurance in the Commonwealth of Pennsylvania and nationwide, while approving a class settlement that encompassed insurance sales regulated in Florida and Pennsylvania and the rest of the several states.

The order of the District Court entered October 25, 1994, (App. 83a), affirmed April 2, 1996 (App. 4a) by the Eleventh Circuit United States Court of Appeals, is also a breach of comity and of States' Sovereignty, so recently stated in BMW v. Gore, 116 S.Ct. 1589 (1996).

The McCarran-Ferguson Act Precludes a District Court from Regulating Insurance Sales in and among the Several States by Approval of a Settlement of a Nationwide Federal Class Action Suit.

A. The McCarran-Ferguson Act precludes the regulation of the business of insurance by court decisions based on substantive law.

The Congress of the United States has passed the McCarran-Ferguson Act, 15 U.S.C.A. 1011-1015, c.20, 59 Stat. 33, March 9, 1945, which specifically prohibits the regulation of the business of insurance by the federal government, and has specifically legislated that the regulation of insurance lies

specifically within the province of the individual states. This national public policy reflects the Constitutional principles of State sovereignty and comity among the States.

§1011 of the Act is headed "Declaration of policy" and states:

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

§1012 states:

"Regulation by State law; Federal Law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

(a) The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State, for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance ..."

Although the McCarran-Ferguson Act was triggered by a decision of this Honorable Court in the field of anti-trust law, the scope of the Act is much broader than the anti-trust field. The legislative history of the Act bears this out. The Report of the House Committee on the Judiciary, House Report No. 113, February 13, 1945, makes this very clear by concluding that "the enactment of this bill will (1) remove the existing doubts as to the right of the States to regulate and tax the business of insurance and (2) to secure more adequate regulation of such business."

Likewise, the discussion of the legislation on the floor of the Senate casts light on its broad sweep. 91 Congressional Record

1443 and 1481 (1945).

The breadth of the Act has subsequently been illuminated by judicial case law. For example, this Honorable Court in FTC v. National Casualty Co., 357 U.S. 560 (1958), held that advertising by insurance companies to promote the marketing of insurance products came within the purview of the McCarran-Ferguson Act.

B. The individual states have a strong rationale to regulate the fraudulent conduct of an insurance company doing business within that state.

In Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991), the Supreme Court found that a State has a strong interest to protect its citizens from fraudulent conduct of an employee of an insurance company and the State can protect its citizens through regulation of insurance by an award of both compensatory and punitive damages. We quote:

> Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. See British General Ins. Co. v. Simpson Sales Co., 265 Ala. 683, 688, 93 So.2d 763, 768 (1957).

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, at 14; 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991)

C. Principles of comity and states' sovereignty require that a federal court respect and not supersede state regulation of the 'business of insurance'.

Recently, judicial restraint and comity have been urged with respect to state sovereignty in the regulation of state laws and their enforcement through civil action for compensatory and punitive damage awards. In BMW v. Gore, 116 S.Ct. 1589 (1996) the power of the courts to enforce the State's right to regulate any business is limited to the State's authority within the boundaries of that State. The Supreme Court has found that a State has the authority to regulate the commerce of business within the State, but that is where the State's authority ends. The State cannot regulate the conduct of business beyond the State's boundaries. Quoting BMW v. Gore, Supra:

> ...by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. ...

BMW v. Gore, 116 S.Ct. 1589, 1597 (1996).

The award by a court of compensatory and punitive damages pursuant to state law are a form of State regulation. Further from BMW v. Gore, Supra:

We think it follows from these principles of state sovereignty that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors

lawful conduct in other States. State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See New York Times Co. v. Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964)("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959)("regulation can be as effectively exerted through an award of damages as through some form of preventative relief").
BMW v. Gore, 116 S.Ct. 1589, ft. nt.17 (1996)

Concerns of federalism and judicial restraint counsel that the federal courts should not legislate to the States what form the deterrence should take, i.e. the amount of damages, and should they be only compensatory and not punitive.

BMW v. Gore, supra, exemplifies the comity and states sovereignty that must be respected by federal courts as well as state courts.

D. The 'business of insurance' is interstate commerce that the Congress intends to be regulated by the states. This intent should not be frustrated by the procedural mechanism of F.R.C.P. 23.

The Supreme Court of the United States has directed caution and forbearance in general before overriding state law and state concerns. In viewing the scope of federal regulation versus state regulation the Supreme Court of the United states has found in Gregory v. Ashcroft, that:

> ... it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. Atascadero,

> supra, at 243. We explained recently: "If Congress intends to alter the `usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984). .... This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 111 S.Ct. 2395, 501 U.S. 452 Page 452 (S.Ct. 1991).

Here the district court with the approval of the circuit court has acted contrary to history, comity States' sovereignty, and the McCarran-Ferguson Act. We quote the district court:

> ... The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement -- an issue controlled by federal law governing settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice of law principles. ... (App. 97a)

The plain reading of the McCarran-Ferguson Act, clearly demonstrates that Congress wants the regulation of the 'business of insurance' to take place in the States, by the States and not by the federal government or the federal courts. A procedural rule, F.R.C.P. 23 cannot and does not give to the court authority to ignore the McCarran-Ferguson Act and the Constitutional role of

Congress. The District Court has taken F.R.C.P. 23 and used it as a tool for ignoring the congressional injunction against Federal regulation of the "business of insurance".

Conclusion

One of the Petitioners has very recently been mailed printed material giving notice of an opportunity to opt-out, two years after it had been represented to the courts below that all parties had been given notice. The District Court very strongly set forth the rigidity of the requirements for such notices in our class action suit. This is another compelling reason for review of this case. If this Petition is not granted, the unseemly result will be to have claims by Pennsylvania citizens based on Pennsylvania insurance regulatory laws made against the New York insurance company foreclosed by action by a United States District Court in Tampa, Florida, presumably applying either Florida law or federal procedural law of settlement of class actions, F.R.C.P. 23. They do not provide the remedies available under Pennsylvania law.

Petitioners respectfully submit that this is a very important case for the future regulation of the 'business of insurance' in this nation, but also for the future adjudication of Federal class action suits in this nation, and that this Honorable Court should grant this Petition in order to establish clear-cut standards in these major fields of law.

Respectfully submitted,

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Dated: September 12, 1996

(2)
Supreme Court, U.S.
FILED
96 423 SEP 12 1996
OFFICE OF THE CLERK

No. 95-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RONALD COULTER and ANISSA COULTER, et al.,

Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

Petition For a Writ of Certiorari To The
U.S. Court of Appeal for the 11th Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COUR

Area Code 202
479-3011

August 2, 1996

Mr. Kenneth W. Behrend
2400 Grant Building
Pittsburgh, PA 15219

Re: Ronald Coulter and Anissa Coulter, et al.
v. Metropolitan Life Insurance
Company, Inc., et al.
Application No. A-77

Dear Mr. Behrend:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on August 2, 1996, extended the time to and including September 12, 1996.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By /s/
Melissa A. Blalock
Assistant Clerk

GRILLI v. METROPOLITAN LIFE INS. CO., INC.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al.; Ronald Coulter; Anissa Coulter,
Appellants,

Sherry Horton, et al., Plaintiffs-
Appellees,

v.

METROPOLITAN LIVE INSURANCE COMPANY, INC., Rick Urso,
Defendants,

W. R. Cunningham, et al., Claimants.
Nos. 94-3328 and 94-3468 to 94-3470.

United States Court of Appeals,
Eleventh Circuit.

July 31, 1996.

Appeal from the United States District Court for the Middle District of Florida (No. 93-1849-Civ-T-23A), Steven D. Merryday, Judge.

Before TJOFLAT, Chief Judge, and RONEY and CAMPBELL,* Senior Circuit Judges.

BY THE COURT:

Appellees' motion to clarify opinion is GRANTED. This court's opinion is hereby clarified by inserting the following sentence between the second and third sentences of the last paragraph of the opinion: "These attorney's fees and double costs shall be paid by the appellants. Their liability for such fees and double costs shall be joint and several." The opinion shall remain otherwise unchanged.

*Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

GRILLI v. METROPOLITAN LIFE INS. CO., INC.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al.; Ronald Coulter; Anissa Coulter,
Appellants,

Sherry Horton, et al., Plaintiffs-Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC.; Rick Urso,
Defendants,

W.R. Cunningham, et al., Claimants.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al., Intervenors,

Douglas Connor; Roena Connor; Ronald Coulter; Anissa Coulter; Darrin Johns; Joann Kablach; Eric Maharg; Terrance McConnell; Deborah Myers; Terry Palmer; Marjorie Palmer; Brian Rohm; James Romano; Mary Romano; Albert Darren Wise; Jeanne Yokel, Appellants,

Sherry Horton, et al., Plaintiffs-Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC.; Rick Urso,

Defendants-Appellees,

W.R. Cunningham, et al., Claimants.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al., Intervenors,

Edward Beliunas; Paulette Beliunas; John Brooks; Stephanie Charles; Shelly A. Daughenbaugh; Jerilyn Freiwald; Nina Heathcote; Daniel Heathcote; Robert W. Hemcher; Kenneth D. Johnson; Michele R. Johnson; Frieda E. Kamel; Jerome J. Knorr; Enod S. Knorr; George Liptak; Ruth Liptak; Kenneth J. Magnes; Sandra Marie McCue; Mark A. Ondrusek; Ernestine Peterson; Rori K. Rasel; Clarence Ridgeway; Emily N. Riehl; Joan C. Velenta; Robert Dale Wiles; Catherine Wiles, Appellants,

Sherry Horton, et al., Plaintiffs-Appellees,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC.; Rick Urso, Defendants-Appellees,

W.R. Cunningham, et al., Claimants.

Peter J. GRILLI, Special Master,

Julio Gonzalez-Roel, et al., Intervenors,

Ronald Coulter; Anissa Coulter,
Appellants,

Sherry Horton, et al., Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY, INC., Defendant-Appellee,

Rick Urso, Defendant,

W.R. Cunningham, et al., Claimants.

Nos. 94-3328, 94-3468, 94-3469 and 94-3470.

United States Court of Appeals,
Eleventh Circuit.

April 2, 1996.

In class action litigation against life insurer, certain class members appealed from orders of the United States District Court for the Middle District of Florida, No. 93-1849-Civ-T-23A, Steven D. Merryday, J. The Court of Appeals held that: (1) denial of intervention as of right or permissive intervention was not erroneous; (2) refusal to allow movants to opt out of settlement class after deadline was not error; (3) order referring matter to special master was not appealable; (4) assuming that dismissal without prejudice of motion to declare movant not member of settlement class was appealable, court acted within its inherent power; (5) movants did not have standing to seek injunctive relief based on defendant's alleged improper communications with other potential class members; and (6) appeal was frivolous, entitling appellees to double costs and reasonable attorneys fees.

Ordered accordingly.

1. Federal Courts 555

Court of Appeals has provisional jurisdiction to review denial of motion to intervene, although ordinarily not appealable final order, under Eleventh Circuit's "anomalous rule"; if Court concludes district court's order was properly granted, its jurisdiction evaporates because ruling is not final order: if Court finds district court erred, however, Court retains jurisdiction and reverses ruling.

2. Federal Civil Procedure 182.5, 340

Refusal in class action suit against life insurer to allow either intervention as of right or permissive intervention to insureds who had instituted separate suit against same insurer in different forum, or to allow them to represent all residents of that forum in suit, was not erroneous where no court had appointed proposed intervenors as representatives of any class of purchasers of insurer's products, nor had any court appointed their attorney to represent anyone with claim against insurer.

3. Federal Civil Procedure 180

Refusal in class action suit to allow class members to "opt out" of class after deadline was not error; movants failed to meet "excusable neglect" standard for opting out after deadline where their failure to act earlier was result of tactical decision. Fed.Rules Civ.Proc.Rule 6(b)(2), 28 U.S.C.A.

4. Federal Courts 585.1

Order referring matter to special master is not final appealable order. 28 U.S.C.A. § 1291.

5. Federal Courts 554.1

Portion of order in class action suit providing for resolution of class-status issues by special master was not appealable; movants had sought determination of whether certain persons were members of settlement class. 28 U.S.C.A. § 1291.

6. Federal Courts 589

Dismissal without prejudice may be treated as appealable final order.

7. Federal Courts 587

Class action court's denial of motion that court declare that movant was not member of settlement class was not final appealable order where motion was denied without prejudice and court anticipated further proceedings with respect to issues raised through reference to special master for resolution. 28 U.S.C.A. § 1291.

8. Compromise and Settlement 67
Federal Civil Procedure 1877.1

Denial without prejudice of motion that court declare movant not to be member of settlement class was reasonable, especially when coupled with reference of class-status issue to special master and was within court's inherent power to fashion efficient and economic solutions.

9. Federal Civil Procedure 2825
Injunction 114(2)

Class members did not have standing to seek injunctive relief, remedial measures, and sanctions based on defendant's alleged improper communications with potential class members where movants were not affected by alleged misconduct and could

not speak for anyone else.

10. Federal Civil Procedure 2840

Appeals from orders denying intervention in class action suit, denying class members request to opt out after deadline, denying without prejudice motion to declare movants not members of settlement class, and denying injunctive relief and remedial measures for alleged improper communications that did not affect moving class members, were frivolous and would result in award of double costs and reasonable attorneys fees to appellees. F.R.A.P.Rule 38, 28 U.S.C.A.

Appeals from the United States District Court for the Middle District of Florida.

Before TJOFLAT, Chief Judge, and RONEY and CAMPBELL *, Senior Circuit Judges.

*Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

PER CURIAM:

Before us for review in these consolidated appeals are orders entered by the district court in a class action suit brought on November 1, 1993, by Sherry Horton and others ("Horton") against Metropolitan Life Insurance Company ("MetLife"). Among other things, these orders denied motions of two class members to intervene in the case, to have their attorney appointed as co-counsel for the class, and to extend the deadline for opting out of the class. We conclude that appellants' challenges to these orders are meritless. The orders were necessary to the efficient disposition of the case, and the district court can hardly be faulted for entering them.

I.

Horton brought this lawsuit in the United States District Court for the Middle District of Florida, to recover, under the federal RICO statute,[1] damages that she and the members of her class allegedly suffered at the hands of MetLife agents who sold them whole life insurance policies on the alleged misrepresentation that they were retirement and/or savings plans. These sales took place in several locations, including Pittsburgh, Pennsylvania, and Tampa, Florida.

On March 25, 1994, approximately four months after Horton brought her suit, Ronald and Anissa Coulter ("the Coulters"), represented by attorney Kenneth W. Behrend of Pittsburgh, sued MetLife in state court in Pittsburgh. They sought recovery for themselves and the members of the Horton class who were residents of Pennsylvania.[2] A class has not been certified in that case,[3] accordingly, at the present time, the Coulters are

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1994) (as added by the Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 901(a), 84 Stat. 922, 941-47). Horton also sought recovery under several other theories of liability, including common law fraud.

[2] They also sought recovery for themselves and others who had purchased MetLife products not formally approved by the Pennsylvania insurance commissioner. The Coulters alleged that, in selling the products described in their complaint, MetLife violated several federal and state laws.

[3] That is, as of the date of the oral argument of these appeals, December 5, 1995, a class had not been certified in the Pennsylvania case.

proceeding in that case alone.

On April 7, 1994, Horton and MetLife reached a settlement agreement. On April 22, the district court certified a settlement class, appointed class counsel, preliminarily approved the proposed settlement and the class notice, and scheduled a fairness hearing for July 18, 1994. In accordance with the settlement agreement, thecourt ordered that any who wished to be excluded from the class opt out by June 13. The court set the same deadline for the filing of claim forms, which accompanied the class notice.

On May 30, 1994, the Coulters, through Behrend, moved the district court for leave to intervene as plaintiffs in Horton. They represented that their claims were "atypical of those in the Horton class." The Coulters' motion requested that the court sever all Pennsylvania residents from the settlement class so that the Coulters could seek to represent them in the suit they had brought in Pittsburgh. Alternatively, the Coulters asked the court to allow their attorney, Behrend, to represent the members of the Horton class from Pennsylvania. In moving the court to intervene, the Coulters did not present the court with a proposed complaint for filing in the case. In fact, at no time have they sought to litigate a claim independently and apart from the Horton class in that case.

The fairness hearing was held as scheduled on July 18, 1994. The district court heard the objections of the Coulters and others to the proposed settlement and to the adequacy of the notice that had been sent to the class. The court also heard argument on the Coulters' motion to intervene. The court denied their motion in an oral ruling from the bench. The court reduced its ruling to a written order on October 25, 1994.[4]

In that order, the court stated that even though the Coulters,

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Comprehensive finds of fact and ocnclusions of law accompanied the order.

as class members, had a legally protectable interest in the action, they were not entitled to intervene as of right under Rule 24. See Fed.R.Civ.P. 24(a). They could protect their interest either by opting out of the class and litigating separately, or by remaining in the case (where, in the court's view, they were being adequately represented by the plaintiffs' attorneys) and, if they thought the proposed settlement was unfair, by objecting to it. Turning to the Coulters' alternative request that they be granted permissive intervention under Rule 24(b), the court observed that the procedures for objecting to the settlement or opting out of the class already offered the Coulters all the relief they were seeking for themselves and the Pennsylvania members of the settlement class.[5] The Coulters appealed the court's rulings in appeal No. 94-3328. The court approved the proposed settlement on the same day it issued a written order denying the Coulters intervention.[6]

After the district court announced from the bench at the July 18 hearing that it was denying the Coulters' motion for leave to intervene, Behrend asked the court to exclude the Coulters from the settlement class even though the June 13 deadline for opting out had passed.[7] Other parties who let the deadline pass sought the

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5 At the same time, the court stated that the Coulters appeared to lack standing to represent the Pennsylvania members of the Horton class on any issue. The Pittsburgh court had not certified a class, had not declared them class members, and had not approved their attorney's representation of any class.

6 The court's approval of the settlement is not an issue in these appeals.

7 The Coulters repeated this request in a written application filed on September 21, 1994.

same relief. The district court denied these requests because (1) none of the movants had established excusable neglect under Federal Rule of Civil Procedure 6(b)(2) for failing to move for an extension of the deadline prior to the deadline date, (2) allowing the requested opt-outs would severely prejudice MetLife's rights under the settlement agreement, and (3) the movants would suffer little, if any, prejudice by remaining in the class, since MetLife would permit them to file late proofs of claim and to participate in the settlement and obtain full restitution. The Coulters and the other late movants appeal this ruling in appeal No. 94-3468.

On October 4, 1994, the Coulters, again through Behrend, filed a "Petition for Injunctive Relief Pursuant to F.R.C.P. 23(d) for Restraint of Improper Contacts in Violation of Local Rule 4.04, and for Sanctions." The petition alleged that two MetLife sales representatives had engaged in improper communications with certain potential class members and that MetLife and/or its counsel were permitting the company to sabotage the class notice. The Coulters asked the court for permission to conduct discovery, to require the issuance of a new class notice, to appoint their attorney, Behrend, as co-counsel for the class, and to award attorney's fees.

Both MetLife and the Horton plaintiffs opposed the motion. Noting the absence of any evidentiary support for the Coulters' petition, the district court concluded that the petition "appears to have been filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney." The court found the petition "unworthy of additional consideration, and because the Coulters and their attorney have consumed already an enormous amount of the parties' and the Court's resources," their request for relief was

denied.[8] The Coulters appeal this ruling in No. 94-3470.

Meanwhile, on September 21, 1994, Edward Beliunas and others ("Beliunas"), who were also represented by Behrend, moved the court to declare that they were not members of the settlement class. The motion was based essentially on counsel's assertion that Beliunas had not received notice of the lawsuit. At the same time, however, the motion seemed to question whether Beliunas had purchased the sort of MetLife product that was involved in Horton and thus whether Beliunas should have been notified at all.

Because the question of whether a policy holder is a class member is a fact-specific inquiry determined on a case-by-case basis, the district court denied Beliunas' motion without prejudice and appointed a special master. The court directed that any of the Beliunas movants who wished to obtain a determination as to whether he or she was a member of the settlement class should petition the special master for such determination. The court set November 22, 1994 as the deadline for filing such petitions. In appointing a special master for this purpose, the court noted that the settlement agreement contemplated the use of a special master to resolve the disputed claims of individual class members. None of the Beliunas movants accepted the court's invitation to petition the special master, however. Instead, all appealed, in appeal No. 94-3469.

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[8] In rejecting the Coulters' petition, the court, sua sponte, admonish[ed] the Coulters and their attorney . . . [to] remain mindful of the provisions of [Federal Rule of Civil Procedure] 11. Rule 11 precludes the filing of superfluous motions for the purposes of wasting valuable resources, perpetuating undue delay, and serving illegitimate self-interests. If applied to the papers filed by the Coulters and their attorney, Rule 11 might well trigger relief markedly different in both effect and object from that which they proposed or contemplated.

II.

These appeals raise several issues. We address only four of them, because they are dispositive. These issues, and our resolution thereof, are as follows.

(1) Whether, in No. 94-3328, the district court (a) erred in denying the Coulters' motion for leave to intervene in the action as a matter of right for the purpose of representing their interests and those of the Pennsylvania members of the settlement class, or (b) abused its discretion in denying the Coulters permissive intervention.

[1] Though a denial of a motion to intervene is generally not considered an appealable final order, we have provisional jurisdiction to review such an order under the Eleventh Circuit's "anomalous rule." EEOC v. Eastern Airlines, Inc., 736 F.2d 635,637 (11th Cir.1984). If we conclude the district court's order was properly granted, our jurisdiction evaporates because the ruling is not a final order. If we find the district court erred, however, we retain jurisdiction and reverse the ruling. Id.

[2] We find no error or abuse of discretion in the ruling. At the time the district court ruled, neither the Pittsburgh court presiding over the Coulters' suit against MetLife, or any other court, had appointed the Coulters as the representatives of any class of purchasers of MetLife products. Moreover, no court had appointed Behrend to represent anyone with a claim against MetLife. We therefore cannot conclude that the district court's denial of intervention was erroneous.

[3] (2) Whether, in No. 94-3468, the district court abused its discretion in denying the requests of the Coulters and others to opt out of the settlement class after the June 13, 1994, deadline had expired.

Because the Coulters made a tactical decision not to opt out in time, and the other movants failed to meet the "Excusable

neglect" standard of Rule 6(b)(2), we see no reason for permitting an opt-out after the expiration of the deadline. Accordingly, we find no abuse of discretion by the district court.

(3) Whether, in No. 94-3469, the district court's order (a) denying without prejudice Beliunas' motion that the court declare that Beliunas was not a member of the settlement class and (b) referring that class-status issue to a special master, is an appealable order and, if so, whether the court's action constituted an abuse of discretion.

[4,5] An order referring a matter to a special master is not a final order appealable under 28 U.S.C. § 1291 because it does not terminate the appellant's claim. See Deckert v. Independence Shares Corp., 311 U.S. 282, 290-91 & n. 4, 61 S.Ct. 229, 234 & n. 4, 85 L.Ed. 189 (1940) (order referring issue to master is

interlocutory and not appealable); Turner v. Secretary of Air Force, 944 F.2d 804, 806 n. 1 (11th Cir.1991) (noting that court had found order of reference to special master non-final). We hold, therefore, that the portion of the challenged order providing for the resolution of class-status issues to a special master is not appealable; we therefore do not review it.

[6, 7] A dismissal without prejudice may be treated as an appealable final order. See Davis Forestry Corp. v. Smith, 707 F.2d 1325, 1326-27 n. 1 (11th Cir.1983). We do not believe, however, that we have a final order before us. The district court denied a motion without prejudice; it did not dismiss a complaint. In short, it was an interlocutory order. Moreover, the court anticipated further proceedings with respect to the issues raised, and provided a means for Belunias and others to have their class status reviewed.

[8] Assuming for the sake of argument that the disposition is appealable, we conclude that the court's action was entirely reasonable, especially when coupled with the reference to the special master. The court simply drew on its inherent power to fashion an efficient and economic solution to the problem the movants presented. Clearly, there was no abuse of discretion.[9]

[9] (4) Whether, in No. 94-3470, the district court abused its discretion in denying the Coulters' motion for injunctive relief, remedial measures, and sanctions based on MetLife's allegedly improper communications with potential class members.

We affirm the district court on this issue because the Coulters lacked standing to seek the requested relief. They themselves were not affected by the alleged misconduct, and they could not speak for anyone else. Even if we were to assume that they had standing, the district court did not abuse its discretion in

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We note in passing that none of the movants objected to the reference to the special master or requested the court to fashion an alternative method for addressing their concerns.

denying the requested relief because the Coulters failed to demonstrate that the alleged misconduct occurred.

III.

[10] These appeals not only lack merit, they are frivolous. We therefore exercise our discretion to award the appellees double costs and reasonable attorney's fees. Those fees shall be determined with respect to each appellant and appellee by the district court following the receipt of our mandate. See Fed.R.App.P. 38; Pelletier v. Zweifel, 921 F.2d 1465, 1523 (11th Cir.), cert. denied, 502 U.S. 855, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991).

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Nos. 94-3328, 94-3468, 94-3469, 94-3470

SHERRY HORTON, et al.,

Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Appellee,

Ronald and Anissa Coulter, et al.,

Appellants.

Consolidated Appeals from final Order entered
October 25, 1994, in the District Court for the
Middle District of Florida
Civil Action No. 93-1849-CIV-T-23A

SECOND PETITION FOR REHEARING

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August 1, 1996

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SECOND PETITION FOR REHEARING

AND NOW comes the Petitioners, Ronald Coulter and Anissa Coulter and the other Appellants, by their attorneys, Kenneth W. Behrend and the law firm of Behrend and Ernsberger, and bring this Petition because of the decision and the ratio decidendi of BMW of North America v Gore, 116 S. Ct. 1589 (1996) (which was decided on May 20, 1996, twenty-one days after our case was decided) and the decision and the ratio decidendi of Georgine v Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) Georgine decided on June 28, 1996. These dates are after the date of decision of your Honorable Court which was on April 2, 1996 and after the denial for the Petition For Rehearing which was May 15, 1996. These two cases have significant persuasion and authority to which obeisance should be given. The persuasion and authority of these cases were overlooked as they were not decided in time for your consideration. Had they been given consideration, the results probably would have been different in this case.

I. THERE IS A PUBLIC POLICY TO DEFER TO THE STATES IN MATTERS OF INSURANCE REGULATION

The Congress of the United States has passed the McCarran-Ferguson Act, 59 Stat. 34, which specifically prohibits the regulation of the business of insurance by the federal government, and has specifically legislated that the regulation of insurance lies specifically within the province of the individual states.

The plain reading of the McCarran-Ferguson Act, clearly demonstrates that Congress wants the regulation of the business of insurance to take place in the States, by the States and not by the federal government, or the federal courts. It may be said that there is public policy opposed to federal regulation or interference in the business of insurance. Regulation is left exclusively to the states.

The Supreme Court of the United States has directed caution and forbearance in general by a federal court, before overriding state law and state concerns. In viewing the scope of federal regulation versus state regulation, the Supreme Court of

the United States has found in Gregory v. Ashcroft, infra that:

> ... "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. Atascadero, supra, at 243. We explained recently: "If Congress intends to alter the usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984)..... This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 111 S.Ct. 2395, 501 U.S. 452 at 452 (S.Ct. 1991).

Congress has specifically restricted the federal government's, and the federal court's, power to regulate the business of insurance, via the McCarran-Ferguson Act. It is clear that the intention of Congress and public policy are that the federal government should not regulate the business of insurance. The Horton Court, through the class settlement, is regulating the business of insurance directly to ignoring the McCarran-Ferguson Act. The Horton Court is seeking to regulate all the States and

impose the insurance law of Florida on them.

II. THE INDIVIDUAL STATES HAVE A STRONG RATIONALE TO REGULATE THE FRAUDULENT CONDUCT OF AN INSURANCE COMPANY DOING BUSINESS WITHIN THAT STATE

In Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991), the Supreme Court found that a State has a strong interest to protect its citizens from fraudulent conduct of an employee of an insurance company and the State can protect its citizens through regulation of insurance by an award of both compensatory and punitive damages.

> Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. See British General Ins. Co. v. Simpson Sales Co., 265 Ala. 683, 688, 93 So. 2d 763, 768 (1957).

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, at 14; 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991).

Principles of sovereignty and comity forbid a court from using the laws of an individual state to enact policies for the entire nation, or to impose an individual state's policy choice on neighboring states. BMW v. GORE, 116 S.Ct. 1589 (1996).

The power of the courts to enforce the State's right to regulate any business is limited to the States' authority within the boundaries of that State. The Supreme Court has found in BMW v. Gore, supra, that a State has the authority to regulate the commerce of business within the State, but that is where the States' authority ends. The State cannot regulate the conduct of business beyond the States' boundaries.

The award by a court of compensatory and punitive damages pursuant to state law are a form of State regulation.

> We think it follows from these principles of state sovereignty that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors lawful conduct in other States. ft.nt. 17. 17 State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See New York Times Co. v. Sullivan, 376

U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964)("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959)("regulation can be as effectively exerted through an award of damages as through some form of preventative relief"). BMW v Gore, 116 S.Ct. 1589 (1996).

Based on this finding the Court struck down a punitive damages award aimed at influencing BMW's nationwide policy. The Supreme Court stated:

> ... by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the States' interest in protecting its own consumers and its own economy. BMW v. Gore, 116 S.Ct. 1589 (1996).

Concerns of federalism and judicial restraint counsel that the federal courts should not legislate to the States what form the deterrence should take, i.e. the amount of damages, and should they be only compensatory and not punitive. The Court in Horton by refusing to review the case as if each individual State had a right

to regulate Metropolitan's conduct and by refusing to consider punitive damages, even though numerous states authorize them, essentially took from the States, the ability to regulate the fraudulent sale of insurance within their boundaries.

III. A READING OF GEORGINE V. AMCHEM PRODUCTS, INC., 83 F.3d 610 (3RD CIR. 1996), REQUIRES THAT THE SETTLEMENT CLASS BE DECERTIFIED, OR THAT THE CLASS MEMBERS OF HORTON, OTHER THAN FLORIDA RESIDENTS, BE INCLUDED ONLY IF THEY OPT-IN AND, THEN, THE LAW OF THE STATE OF THEIR RESIDENCE MUST GOVERN THE DISPOSITION OF THEIR CLAIM

Georgine v Amchem Products, Inc., supra, is an asbestos injury case, involving between 250,000 and 2,000,000 individuals. A class action was certified by the District Court and the Court approved a settlement which would extinguish "future claims" of "exposure only" plaintiffs even though they had not accrued.

The order of certification was vacated.

The decision of the United States Court of Appeals for the Third Circuit is in almost complete conflict with the opinion here. The facts of Georgine, supra, and our case are very close to being congruent.

The Third Circuit Court recognized the efforts of an extremely able judge and creative lawyers in crafting a 106 page settlement document. The Court opined:

> "The resolution posed in this settlement is arguably a brilliant partial solution to the scourge of asbestos that has heretofore defied global management in any venue. "

Georgine, supra, page 617.

However, an alarm was sounded by the Third Circuit Court when it noted:

> ... against the need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system. Senators have complained that the use of class actions to resolve mass toxic torts, particularly those involving future claims, improperly involves the judiciary in the crafting of **legislative** solutions to vexing social problems. These criticisms are not merely abstract; they are levied in terms of the fundamentals of the federal judicial polity; jurisdiction, justiciability, notice and the requirements of Federal Rule of Civil Procedure 23. (Emphasis added).

Georgine, supra, page 617.

> Based on this concern the Court went on to hold:
>
> ... we will vacate the district courts' order certifying the plaintiff class and remand with directions to decertify the class and vacate the injunction. We recognize that our decision undermines the partial solution to the asbestos litigation crisis. However, in doing so, we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks. We thus leave legislative solutions to legislative channels.

Georgine, supra, page 618.

As in Georgine v Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) we are faced with a case that forces "the judicial system to choose between forging a solution to a major ... problem on the one hand, and preserving its institutional values on the other." Our case which is offering to extend itself from the Tampa Bay area of Florida across the continent through efforts of imaginative defense counsel, favorable injunction and a latently ambiguous class action settlement order, involves potentially millions of American families and life insurance policyholders who had faith that life insurance was safe from the manipulative greed and unscrupulous

sales practices of an unscrupulous life insurance company.

By now it is sensible to assume that your Honorable Court has become aware that companies other than the Metropolitan Life Insurance Companies have admitted to sales scams on their policy holders, so enormous in scope that they shock even the most cynical. Because life insurance companies are so exclusively state creatures, no one has an understanding of how the companies can be brought before only one court. Because Metropolitan's agents perpetrated different scams against different groups in different states, the lumping of them together for dispositive class action adjudication, clashes with the fundamentals of the federal judicial polity: jurisdiction, justiciability, notice and the requirements of Federal Rule of Civil Procedure 23.

Judge Merryday created and employed an innovative way to dispose of hundreds of thousands and maybe a million, whole life policyholder claims against Metropolitan Life Insurance Company. The class action settlement and the injunction issued against the policyholders, who had been cheated by the company and its sales agents, could be administered with an economy of

Judicial effort through the direction of the United States District Court for the Middle District of Florida, Tampa Division.

With respect to our case, there are many policyholders all over the United States who do not know they have been taken by a Metropolitan Life Insurance Company scam, and may not know for many years that they have been cheated by Metropolitan. They may not learn of their being cheated until some year in the future when they will get a premium notice, increased, in some multiple amount. Some policyholders will only learn of the deception when they retire and are disappointed when their promised expectations are not met. Others will only realize their injury when some honest financial planner explains that the policy they have is inappropriate for the purposes they were advised to purchase it, or when a tax has to be paid which Metropolitan Life Insurance Company did not disclose at the time of purchase and, undoubtedly, other situations, such as how much money was lost by cashing in a policy to provide a commission for a Metropolitan Insurance Company agent.

Some policyholders have been cheated by being offered a

document that defies adjectival description. However, some policyholders were informed that they could have their money they paid in premiums returned to them, if they could verify in writing that as part of the scam worked on them, they did not know that they were purchasing insurance. Many of these whole life policyholders had taken insurance physical examinations arranged for by Metropolitan Life Insurance Company and knew they were to receive life insurance.

The size of the group of Metropolitan Life Insurance Company policyholders injured during the years of the Florida sales office nurses' retirement scam can only be estimated, Metropolitan Life Insurance has not made a public disclosure. Between a minimum of two hundred thousand and a maximum of a million may have purchased insurance through deception. Most of the estimated policyholders were not even part of the nurses' scam; they were part of other Metropolitan Life Insurance Company scams.

IV. QUESTIONABLE FEDERAL QUESTION JURISDICTION, A QUESTIONABLE OPT-OUT PROVISION AND QUESTIONABLE REPRESENTATION, SHOULD REQUIRE JUDICIAL CAUTION AND FORBEARANCE FROM DECLARING A SETTLEMENT CLASS OR APPROVING AN AMICABLE APPEARING SETTLEMENT AGREEMENT

Federal question jurisdiction in the Horton case was based on suspect grounds, that federal regulation of the business of insurance can be accomplished through the Racketeering Influenced Corrupt Organization Act (RICO), specifically that RICO applies to the business of insurance. On the face of the Horton complaint it was clear that RICO was used to obtain jurisdiction in contradiction to the mandate of Congress in the McCarran-Ferguson Act.

The Horton court should have used judicial restraint, because of the mandate of congress, and should not have exercisedany jurisdiction, because of the mandate of Congress. It was an unnecessary impingement on the individual States' rights to protect their citizens, and the individual States' legitimate interest

in punishment and deterrence.

Instead of using judicial restraint, consideration for State sovereignty and comity, the Horton court through the settlement order, regulated the business of insurance, not only in Florida, but for every state in the country. The Horton court found that settlement proposal in the Horton action, which only provided for compensatory damages, to be "fair" for every State, and it made no inquiry into the laws of each individual state, despite the fact that the settlement would have a preclusive effect on claims filed in these States. Moreover, no punitive damages were considered, regardless of every States' individual interest in the regulation of insurance and the deterrence of fraud.

This second request for a rehearing in this case is occasioned by the fact that, after the class certification by the district court, after the denial of appeals by this Honorable Court, and after a request for rehearing was denied by this Honorable Court, there has been a growing consensus of judicial opinion that class certification must be carried out as if the case were going to be litigated, and without taking the settlement into account. See

Georgine v. Amchem, id. at 617, 618.

As the Third Circuit noted in Georgine:

> We now hold that because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, and because "[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," id. at 799, the 23(b)(3) criteria must also be applied as if the case were to be litigated. While the better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.

V. THE CASE AND CONTROVERSY REQUIREMENT OF ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES WAS NOT MET IN OUR CASE

The suit on which the class settlement rests is a feigned suit -- and thus is not a justiciable case or controversy under Article III of the Constitution. To qualify, the plaintiffs and plaintiffs' counsel, had to have the implausible intention of litigating the RICO claim that became the basis of Judge Merryday accepting jurisdiction. The RICO claim asserted was patently not sustainable.

The RICO claim was filed, merely to provide a forum to seek approval of a result that plaintiffs and defendants jointly pursued. This contention is supported by numerous facts. First: no opposition pleading was filed to the RICO claim, which on its face should have been dismissed. Second: no deposition discovery was taken. Third: the length of time the case existed from filing to settlement; the complaint was filed on November 1, 1993, the Second Amended Complaint was on February 14, 1994, (no answer or motion to dismiss was filed), and only two months after amending the complaint, on April 12, 1994, the joint motion to settle was filed. Fourth: the joint motion requesting certification of the proposed settlement class, preliminarily approving proposed settlement, approving notice and setting fairness hearing, needs to be closely reviewed. The attorney's fees and settlement amount were negotiated simultaneously, Counsel for plaintiffs was to be paid $2,750,000 to be paid separately from any settlement fund while the class members could keep their policy, or receive a refund of a few hundred to a few thousand dollars each, said refund was already agreed to by Metropolitan via numerous

agreements with various insurance commissions. Fifth: despite the complexity and enormity of the affect of the settlement upon hundreds of thousand of policyholders due process rights, the fairness hearing was accomplished in one day. Sixth: The standard for class determination and settlement unabashedly was not a litigation standard, but something less stringent, less demanding and more relaxed than a litigation standard.

VI. IT IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT AND THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES THAT THE HORTON CLASS CONTAIN AN OPT-OUT PROVISION, THAT IS CLEAR AND UNEQUIVOCAL BOTH IN LANGUAGE AND OPERATION.

Due process calls for a Constitutional right to opt-out of the class. It is Appellants' assertion that there was not an opt-out provision created for the Horton class settlement that applied to the Appellants. A class action settlement, to comply with the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, must have an opt-out provision.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 86 L.Ed.2d 688, 105 S.Ct. 2965.

Appellants assert that while there was an opt-out provision drafted for the Horton settlement and the creators of the provision, we believe, though that they had molded an opt-out provision, they had not succeeded, it was Constitutionally defective.

As an example, Mr. and Mrs. Coulter first learned that they must act as class members of the Horton class when were told by the District Court, after the Fairness Hearing, and confirmed by the Eleventh Circuit Court of Appeals, that they were in the Horton class.

If the Coulters had received a class notice, (which they deny receiving), they would have read, in the class notice and proof of claim form, that if they understood that they were purchasing life insurance, they did not qualify as class participants for any money distribution.

The opt-out provision had nothing for the Coulters, once they were declared part of the Horton class. The Coulters understood they were buying life insurance and the Court included

them as Horton class members, even though they could not participate in any proceeds of the class settlement.

For the opt-out provision to be worthy of the name, there had to be additional time provided; if for some reason, probably not anticipated by the creators of the provision, it would cause Metropolitan policyholders to be declared part of the class, when they were not entitled to receive any proceeds from the class distribution. The class notice put them into the Horton class settlement, and the qualifications for receiving any distribution (i.e. no knowledge that they were purchasing insurance) prevented sharing in the class distribution.

For the opt-out provision to be anything but unconstitutional there had to be some provision for people, such as the Coulters, to opt-out after a determination was made that they were part of a class and that they could recover nothing from the class settlement.

CONCLUSION

It is respectfully submitted, if the body of judicial opinion exemplified by Georgine v. Amchem Products Inc., supra, were to

be applied to this case, this Honorable Court would remand the case to the district court with instructions to carry out the process of class certification as if the case were going to be litigated and to rigorously apply all the stringent requirements of FRCP Rule 23 relating to class certification. In the alternative, this Honorable Court should declare the Coulters and all who could not verify that they did not know that they were buying insurance from Metropolitan Life Insurance Company, not to be Horton class members.

Respectfully submitted,

BEHREND AND ERNSBERGER

/s/ _____
Kenneth W. Behrend, Attorney for
Ronald and Anissa Coulter

CERTIFICATE OF SERVICE

I, Kenneth W. Behrend, hereby certify that a true and correct copy of the within Second Petition for Rehearing was mailed to the Court this lst day of August, 1996, and to the following by United States mail, first class postage prepaid, addressed as follows:

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BEHREND AND ERNSBERGER

/s/_____
Kenneth W. Behrend

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-3328; 94-3468
94-3469; 94-3470

PETER J. GRILLI,

Special Master,

JULIO GONZALEZ-ROEL, et al.;
RONALD COULTER; ANISSA COULTER,

Appellants,

SHERRY HORTON, et al.,

Plaintiffs-Appellees,

versus

METROPOLITAN LIFE INSURANCE COMPANY,
INC.; RICK URSO,

Defendants,

W. R. CUNNINGHAM, et al.,

Claimants.

On Appeal from the Untied States District Court for the
Middle District of Florida

ORDER:

Appellants' Motion for Leave to File a Second Petition for Rehearing is Denied.

/s/
CHIEF JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Nos. 94-3328, 94-3468, 94 3469, 94-3470

SHERRY HORTON, et al.,

Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY

Defendant-Appellee

Ronald and Anissa Coulter, et al.,

Appellants.

Consolidated Appeals from final order entered
October 25, 1994, in the District Court for the
Middle District of Florida,
Civil Action No. 93-1849-CIV-T-23A

PETITION FOR REHEARING

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April 22, 1996

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with respect to the issues of the Coulters, the Beliunas and other putative class members, all citizens of Pennsylvania, being part of the Horton class action settlement class and, if so, opting out. Our argument will be in the alternative. Either a national class action be declared with a subclass for Pennsylvania citizens with protection of the rights they have as citizens of Pennsylvania. In the alternative, we ask that the Coulters, the Belunias, and other putative class members who have made efforts to opt out or have attempted to be declared not part of this action be declared opted out.

To do otherwise is to be in violation of the Tenth Amendment and the due process clauses of the United States Constitution Fifth and Fourteenth Amendments.

Petitioners also respectfully request an opportunity to be heard on the F.R.A.P. 38 sanctions issue: demonstrate Petitioners' petition for intervention and request for injunction were proper and necessary under the circumstances and comported with respected authority. Petitioners also respectfully request an opportunity to remedy the practical procedural problems resulting from the

opinion. It is asked that a hearing be granted to set aside the sanction order under F.R.A.P. 38; that a hearing be held on the creation of a national class action with a subclass of the Horton class called the Coulter class or that the citizens of the State of Pennsylvania who have made themselves known as wishing to be opted out be declared not part of the class.

Respectfully submitted,

BEHREND AND ERNSBERGER

/s/_____
Kenneth W. Behrend
Attorney for Petitioners

IV. APPENDIX

EXCERPTS FROM NEWBERG ON CLASS ACTIONS

1st Edition, **§ 8156i - Class or Individual Intervention in Pending Class actions; Class Intervention in Individual Actions**

"One seeking to intervene must file the appropriate motion, under Rule 24. ..."

"From the plaintiff's lawyer's standpoint, there may be specific strategies that are served in considering whether or not to intervene in a pending class action, and if so, whether to intervene individually or in behalf of a class. ..."

"Where a prospective class plaintiff seeks to intervene, either individually or on behalf of an intervener's class, in pending litigation in which there has not yet been a class ruling, this serves the important purpose of bolstering the adequacy of representation for certifying a class. This same objective of enhancing class certification possibilities, where there may be some doubt concerning how widespread the legal problem is, or whether sufficient persons are involved to justify class treatment, may be

achieved by commencing a new class action in one's home district, paralleling representative litigation already initiated elsewhere. ..."

"Finally, there may be situations where individual actions are pending, and it becomes important to intervene as a class in order to preserve the rights of class members and achieve an advantage already obtained by the pending proceedings. ..."

3rd Edition **§ 7.31 Conflicting or Overlapping Classes**

"When multiple litigation in one or more forums results in the pendency of overlapping or conflicting class actions, the court should take prompt steps to reach an initial class determination. If a plaintiff has filed a class suit in which the putative class sought may be part of an already existing class in another district, the court, after determining that a conflict actually exists, may transfer the case for consolidation, or determine the class on its own. If the court finds that a class is appropriate, and that the conflict may be resolved, it should act to do so by establishing subclasses based on appropriate descriptive characterizations, to protect class members interests and to facilitate management of the action.

Multiple Class Suits before Different Courts

"When cases bearing similar class allegations and similar causes of action are pending in different courts, such as different federal and state courts or different state courts should be kept informed of class certification proceedings relating to the same cause of action, and rarely should the same class be certified on the same cause of action before more than one court, in the absence of special circumstances.

In determining the superiority of certifying a class in a particular forum, the court should compare the advantages of a class suit in the different fora and should weigh considerations of class scope, tolling of statute of limitations for the benefit of the class, reconciliation of pending individual suits with the certification of a class suit without opt-out rights under Rule 23(b)(1) or (2), whether in fact a class suit is pending in another more favorable forum, certification of a class limited to selected issues or claims, the state of litigation progress in the competing suits, and a host of other factors."

§9.48 Resolving Overlapping or Conflicting Class Actions with Subclasses and Other Means

"When multiple litigation has resulted in the pendency of overlapping or conflicting class actions, the court should take steps to reach a reasonably prompt initial class determination. If it finds that a class action is appropriate, it should take appropriate steps to resolve the overlapping or conflicting class actions. Where class members share common issues with respect to the general liability of a defendant but have divergent issues or interests with respect to the impact and damages suffered or relief requested, the establishment of subclasses by the court under Rule 23(c)(4) will facilitate management of the litigation and will preserve maximum protection of the interests of class members. ..."

"... When subclasses are created, they may be formed on the basis of geographical scope, or by any other appropriate descriptive characterization. Alternatively, the court may redefine the class as alleged in the overlapping complaints in order to establish one uniform class for the pending actions."

§16.06 Intervention by Absent Class Members: Introduction

"... However, intervention may be necessary, in a number of situations, to avoid mootness or to assure typicality of claims on behalf of the class. It may also be permitted because "it may be helpful at trial or in formulating relief..., or because it might facilitate a subdivision of the class should subclasses become necessary.

A putative intervenor must satisfy the requirements of Rule 24 before intervening. Limitations may be placed on intervenors. Under Rule 23(d)(2) there is no absolute right to intervene, and the court may deny intervention if it would serve no useful purpose. The court also may deny intervention where the movant has failed to exhaust administrative remedies or when the scope of the action would be broadened."

"... The following sections discuss the purpose and benefits of intervention before and after class certification as well as after a denial of certification, the timeliness of intervention, and the role of intervention in class settlement proceedings."

§16.07 Intervention of Right

"Under Rule 24(a), members of a class have a right to intervene if their interests are not adequately represented by existing parties. For example, inadequacy may result from the existence of intervenor interests common to the class but different from those of the class plaintiff, or from mootness or potential mootness of the named plaintiff's claim. Rule 23 specifically contemplates intervention in class suits, and in certain situations courts may permit intervention even when representation is adequate.

Parties seeking intervention must have an interest in litigation. Intervention pursuant to Rule 24(a)(2) may be denied if disposition of the action cannot as a practical matter impair or impede the intervenors' ability to protect their interests.

Intervention in Rule 23(b)(2) actions by class members may be significant to protect their interest because they cannot opt out of the suit even if they are inadequately represented. Thus, intervention avoids "subsequent collateral attacks on the due process preclusive effect of a judgment...."

Though application for intervention must be timely under Rule 24(a)(2), courts have been more flexible when intervention is of right rather than permissive.

Absent class members may intervene of right to appeal a class certification denial after final judgment. Intervention has also been permitted to parties seeking to set aside a consent decree..."

CERTIFICATE OF SERVICE

I, Kenneth W. Behrend, hereby certify that a true and correct copy of the within Petition For Rehearing was mailed to the Court this 22nd day of April, 1996, and to the following by United States mail, first class postage prepaid, addressed as follows:

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BEHREND AND ERNSBERGER

By: /s/
Kenneth W. Behrend

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 94-3328; 94-3468
94-3469; 94-3470

PETER J. GRILLI,
Special Master,

JULIO GONZALEZ-ROEL, et al.;
RONALD COULTER; ANISSA COULTER,

Appellants,
SHERRY HORTON, et al.,

Plaintiffs-Appellees,

versus

METROPOLITAN LIFE INSURANCE COMPANY,
INC.; RICK URSO,
Defendants,

W.R. CUNNINGHAM, et al.,
Claimants.

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: TJOFLAT, Chief Judge, RONEY and CAMPBELL*,
Senior Circuit
Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants,

Gonzalez-Roel, et al., is Denied

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

---

*Honorable Levin H. Campbell, Senior U.S. Circuit Judge for the
First Circuit, sitting by designation.
ORD-41

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER GRANTING PERMANENT INJUNCTION

Before the Court is a motion by defendant Metropolitan Life Insurance Company ("MetLife") seeking a permanent injunction under the All-Writs Act, 28 U.S.C. § 1651(a), against Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon, who have filed individual lawsuits against MetLife in Alabama. The motion was fully briefed by all parties and was the subject of a hearing before the Special Master on July 24, 1995. After the hearing, the parties were permitted to make additional submissions.

Based on the foregoing, and on the Court's overall familiarity with the litigation and settlement of this class action,

IT IS HEREBY ORDERED that:

1. Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon (collectively, the "Alabama plaintiffs") are hereby determined to be members of the settlement class previously certified in this action because (1) they purchased their MetLife whole life insurance policies from MetLife's Tampa, Florida sales office between January 1, 1988 and October 31, 1993, or from other MetLife sales offices between January 1, 1990 and October 31, 1993, during the class period, (ii) they bought their policies as retirement and/or other savings plans or vehicles, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, and (iii) they did not timely exclude themselves from the settlement class.

2. This Court previously entered an Order and Final Judgment under Fed. R. Civ. P. 54(b) releasing MetLife and its officers, directors, employees, agents, representatives, and its

predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents and representatives of any or all of them (collectively, "MetLife and its Affiliates"), from any and all claims or cause of action that (i) have been or could have been asserted in this action or (ii) have been, could have been, may be or could be alleged by any settlement class member against MetLife and its Affiliates on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, described or referred to in this action or that are related to sales solicitations described in the Second Amended Complaint in this actior. (the "Sales Solicitations") or the purchase of Whole Life Policies (defined as policies designed by MetLife as Whole Life, Life Paid Up at 95 or Life Paid Up at 98), including without limitation any and all claims for damages, rescission, equitable and legal relief, attorneys' fees, costs or disbursements incurred by any person or entity in

connection with or related in any manner to this action, the settlement thereof, the administration of this settlement, the Sales Solicitations or the purchase of Whole Life Policies; provided, however, that nothing in that prior Order was intended to bar any action to enforce the parties' Settlement Agreement in accordance with its terms.

3. The Court also dismissed all claims of plaintiffs and settlement class members on the merits and with prejudice, and it retained jurisdiction to administer the settlement and enforce its Orders and Judgment.

4. Based on its prior Orders and Judgment, the Court hereby determines that the Alabama plaintiffs' claims have been discharged and dismissed with prejudice and on the merits and that the Court's rulings are res judicata as to those claims.

5. The Alabama plaintiffs and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, are hereby permanently enjoined from pursuing in the Alabama courts, or any forum other than this Court, any claims that were

or could have been raised in this action, and from taking any further action in the Alabama courts other than filing voluntary notices of dismissal of their individual actions on the merits and with prejudice.

6. To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action.

7. MetLife is hereby ordered to abide by its offer to grant the Alabama plaintiffs the opportunity to apply for the same settlement relief provided to eligible settlement class members, i.e., a refund of net premiums plus interest as specified in the Settlement Agreement, or a MetLife Growth Plus Annuity, notwithstanding the expiration of the claim-filing period. If the

Alabama plaintiffs wish to take advantage of this offer, they must file Proof of Claim Forms in substantially the same form as those previously approved by the Court, not later than 30 days from the date of this Order.

8. The injunctions issued in this Order are authorized by the All-Writs Act, 28 U.S.C. § 1651(a), and the Anti-Injunction Act, 28 U.S.C. § 2283, because they are necessary to protect and effectuate this Court's Final Judgment and are necessary in aid of this Court's continuing jurisdiction.

IT IS SO ORDERED in Chambers in Tampa, Hillsborough County, Florida this 8th day of November, 1995.

/s/
Steven D. Merryday
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

VS. CIV. No. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class

settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94).

These motions were briefed, and affidavits were submitted. The Court heard oral argument at the July 18, 1994 hearing on the fairness of the proposed settlement.[1] Upon consideration of the papers submitted and arguments made, the Court denied the intervention motions and determined that Daxon and Urso do not have standing to object to the proposed

---

[1] The former sales managers moved for leave to file a reply brief in support of their motion to intervene, and they tendered a proposed reply brief with the motion. (Docket No. 90.) Leave to file a reply brief is granted; the reply brief has been considered by the Court. In addition, plaintiffs moved to supplement their response to the motion to intervene. (Docket No. 108.) This motion also is granted, as ordered below, and the supplemental material has been considered by the Court.

settlement.[2] In accordance with and in support of the determinations made at the hearing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Factual Background

1. Plaintiffs' central allegation in this case is that they and other members of the settlement class purchased whole life insurance policies issued by Metropolitan Life Insurance Company ("MetLife") as retirement and/or other savings plans or vehicles as a result of written or other sales solicitations that allegedly did not fully disclose that the product being sold was life insurance.

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[2] At the July 18 hearing, counsel for the former sales managers (except Mr. Ferrandes) did not assert their clients, alleged standing to raise their previously filed objections. Instead, counsel spoke only on behalf of Daxon. After the Court's bench ruling on Daxon's lack of standing, however, the parties and the former sales managers stipulated on the record that the former sales managers were not settlement class members.

2. The complaint in this action was filed in November 1993 and was widely publicized in the press, particularly in the Tampa Bay area.

3. In April 1994, plaintiffs and MetLife agreed to a proposed settlement of this action and entered into a Settlement Agreement.

4. On April 22, 1994, this Court issued its Order with respect to Class Certification, Notice, and Settlement Hearing (Docket No. 48), certifying a settlement class consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from
>
> (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or
>
> (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

5. The April 22 Order also approved forms of individual and publication notice and a proof of claim form. The proof of claim form required settlement class members who

sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.)

The Coulters

14. The Coulters are the named plaintiffs in an action originally filed on or about March 25, 1994, in the Court of Common Pleas of Allegheny County, Pennsylvania, but now pending after removal in the United States District Court for the

Western District of Pennsylvania, Civil Action No. 94-0629. (Their complaint is attached as Exhibit 2 to Docket No. 77.)

15. The Coulters' Pennsylvania action asserts, inter alia, claims on behalf of a putative "subclass" of Pennsylvania residents who allegedly were solicited to purchase MetLife whole life insurance policies as savings and/or retirement plans. These allegations are substantially the same as those asserted by plaintiffs in this action.

16. The Coulters did not file a proposed complaint with their intervention motion, as required by P2d. R. Civ. P. 24(c). Instead, they sought to have "all Pennsylvania residents . . . severed [from this action] and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action" against MetLife. Alternatively, the Coulters asked "that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law." (Docket No. 77, at 1-2.)

17. The Coulters have not yet moved for class certification in Pennsylvania. Nor have they sought to have their attorney appointed as class counsel. MetLife has filed a motion

to dismiss the Coulters' amended complaint, and that motion is pending before the federal district court in Pennsylvania.

18. As of June 8, 1994, approximately 800 Pennsylvania settlement class members had filed proofs of claim, even though the deadline for filing was not until June 30, 1994.

19. The Coulters asserted that, in January or February 1993, they purchased a MetLife whole life insurance policy that allegedly had been represented as a retirement or savings plan. (Pennsylvania Complaint ¶ 30-36.) They also claimed they purchased the insurance in part on the basis of sales solicitations that allegedly "failed to disclose that the solicitation was intended to propose insurance . . . . 11 (Id. ¶ 31-32.) These allegations place the Coulters, as individuals, within the settlement class certified by this Court.

Timing of Intervention Motions

20. Before the former sales managers and the Coulters filed their intervention motions on May 12 and 23, respectively, plaintiffs and MetLife had already entered into a settlement

agreement, and this Court had preliminarily approved that agreement as sufficiently reasonable, adequate and fair to warrant notice to members of the settlement class. Following entry of the Court's April 22, 1994 Order granting preliminary approval, individual notice and claim forms were mailed to approximately 71,000 potential settlement class members, and notice was published in newspapers and magazines with a combined circulation in excess of 7 million. (Docket No. 144, 149.)

CONCLUSIONS OF LAW

Intervention as of Right

21. Absent an express statutory right to intervene (which the would-be intervenors do not assert), an applicant may not intervene as of right under Fed. R. Civ. P. 24(a) (2) unless:

> (1) the application to intervene is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to

the suit.

ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (Ilth Cir. 1990).

22. An applicant must meet all four criteria to intervene under Rule 24(a)(2). Id.; accord Washington Elec. Cooip.. Inc. v. Massachusetts mun. wholesale Else. Co., 922 F.2d 92, 96 (2d Cir. 1990). The Court has considered each of the four factors as follows.

The Coulters

42. The Court next considers the four Rule 24(a)(2) requirements in connection with the Coulters' motion to intervene.

43. **Interest and Impairment of Interest:** Because the Coulters are settlement class members, they have a legally protectable interest in the subject of this action. This Court's April 22, 1994 Order, however, allowed the Coulters -- and any other dissatisfied Pennsylvania residents within the settlement class -- to opt out of the settlement class and litigate elsewhere if they chose to do SO. Thus, the Coulters and other Pennsylvania

residents cannot claim that the disposition of this action would unduly impede or impair their interests if intervention were denied. See, e.g., Roberts v. Heim, [1989] Fed. Sec. L. Rep. (CCH) 1 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same).

44. In the alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. See Fed. R. Civ- P. 23(c)(2)(c). The Coulters appeared through their own attorney at the fairness hearing.

45. As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights. See, e. g., Webcor Elec. Inc. v. Whiting, 101 F.R.D. 461, 466 (D. Del.

1984) (denying intervention to shareholders because they could object at fairness hearing); Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 901, 829-30 (N.D. Cal. 1979) (denying intervention to class members who had opportunity to object at fairness hearing), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Alaniz v. California Processors, Inc., 73 F.R.D. 289, 295 (N.D. Cal. 1976), aff'd sub nom. Alaniz v. Tillie Louis Foods, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).

46. **Adequacy of Presentation:** The Court also rejects the Coulters' argument that plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles.

47. Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in this action and that Rule 23(a)'s requirements of commonality,

typicality and adequacy of representation are not satisfied as to the putative subclass they allege. These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements "may be more easily satisfied in the settlement context than in the more complex litigation context." Dalkon Shield Claimants Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.), 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989); see also Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157-58 (S.D. Ohio 1992).

48. Timeliness: The Court questions whether the Coulters' intervention motion is timely under the factors articulated in Reeves, 754 F.2d at 968-69. The Coulters filed their Pennsylvania action on or about March 25, 1994; they therefore knew of their claims before that date. Moreover, in light of the extensive national publicity that this case and MetLife's sales solicitations received, the Coulters quite likely knew or should have known about this action when they filed their Pennsylvania suit. Yet the Coulters did not move to

intervene here until May 23 -- well after the Court had preliminarily approved the proposed settlement and individual notice had been mailed to potential settlement class.

49. The Court need not decide, however, whether the Coulters' intervention motion was timely because the motion fails to satisfy two of the other four Rule 24(a)(2) requirements: impairment of interest and inadequacy of representation. As discussed above, a prospective intervenor must meet all four of those requirements to intervene as of right. ManaSota-88, Inc., 896 F.2d at 1321; accord Washington Elec. Coop., Inc., 922 F.2d at 96. In addition, denial of intervention would in no way prejudice the Coulters because (i) they had an opportunity to exclude themselves from the settlement class or object to the proposed settlement and (ii) they actually entered an appearance in this case.

50. The Court therefore concludes that the Coulters cannot intervene as of right because they have not met Rule 24(a)(2)'s requirements. Moreover, their motion is defective for several other reasons.

51. Asserted Right to Represent Other Pennsylvania Residents: The Coulters' attempt to exclude all Pennsylvania residents from the settlement class is improper. Just as the Coulters had the right to participate in or opt Out of the settlement class, so did every other settlement class member who resides in Pennsylvania. The Coulters have no authority unilaterally to make that decision for all other Pennsylvania settlement class members. See 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 16.16 at 16-90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel") (emphasis added). The type of group or mass opt-out that the Coulters seek therefore is improper -- especially where so many Pennsylvania residents already have filed claim forms expressing their desire to participate in the proposed settlement. See, e. g., Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on an individual basis, and noting that "a mass opting out . . .

clearly would be disruptive to the district court's ongoing settlement management").

52. The Coulters' attempt to "sever" or exclude all Pennsylvania residents from the settlement class also is particularly inappropriate because the Coulters have not been determined to be adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege or to force the putative subclass members' withdrawal from the settlement class certified in this action.

53. Due Process: The Coulters' claim that this Court's application of Florida law to Pennsylvania residents would violate due process is unfounded. The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement -- an issue controlled by federal law governing

settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of law principles. In addition, if the Coulters and other Pennsylvania residents believed that Pennsylvania law gave them a greater potential recovery than would be available to other settlement class members, they could have excluded themselves from the settlement class.

54. **Procedural Defect**: Intervention also is denied because the Coulters did not attach a pleading as required by Rule 24(c) "setting forth the claim or defense for which intervention is sought." The failure to attach a pleading is especially significant here because the Coulters do not even attempt to assert a claim or defense; rather, they seek to intervene so they can "sever" themselves and all other Pennsylvania residents from the case.

Permissive Intervention

55. Where an applicant may not intervene as of right under Rule 24(a)(2), the Court nevertheless has discretion to

permit intervention under Rule 24(b)(2) if the application is timely and if

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2); see, e.g., ManaScota-88, Inc., 896 F.2d at 1323.

56. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." Worlds, 929 F.2d at 595 (quotations omitted).

The Coulters

64. As discussed above, the Coulters' intervention motion might be untimely. But more importantly, the procedures adopted by the Court for potential class members to object or exclude themselves from the settlement class already offer the Coulters all the relief they seek for themselves and

other Pennsylvania settlement class members. granting permissive intervention thus would serve no purpose where the would-be intervenors wish only to "sever" themselves from the action and already have the right to do so. (As discussed above, however, the Coulters' unilateral attempt to "sever" other Pennsylvania settlement class members is improper.)

In Tampa, Florida, on October 25th, 1994.

/s/
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CIVIL ACTION NO. 93-1849-CIV-T-23A

SHERRY HORTON — PLAINTIFFS
1732 Cone Street
Toledo, OH 43606

JOYCE ARMBRUSTER
Oakwood Drive
Largo, FL 34640

VS.

METROPOLITAN LIFE INSURANCE COMPANY
DEFENDANTS
SERVE: Stuart Nagler
An Officer and managing Agent One Madison Avenue
New York, NY 10010

RICK URSO
2826 Morrison Avenue
Tampa, FL 33609

INTERVENOR'S (PENNSYLVANIA COULTER CLASS') MOTION FOR INTERVENTION

Pursuant to Fed.R.Civ.P. 24, Ronald and Anissa Coulter, representatives of the class of Pennsylvania residents (Intervenors) similarly injured by the Metropolitan Life Insurance Company's (hereinafter MetLife) insurance practices,

respectfully requests that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. if the Court does not permit severance, in the alternative, the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

1. Ronald and Anissa Coulter are Pennsylvania residents who purchased a "50/50 Savings Plan" in Pennsylvania from a MetLife agent based in Butler, Pennsylvania. The 50/50 Savings Plan" was allegedly a retirement plan with a life insurance component. In reality, it was whole life, life insurance.

2. The "50/50 Savings Plan", as it was presented and sold to consumers in Pennsylvania, was never presented to the Pennsylvania insurance Department, and accordingly was not approved by the Pennsylvania Insurance Department.

3. The "50/50 Savings Plan" did not contain disclosure language to the effect that the plan, because it was comprised

only of whole life insurance, was not an investment or savings plan.

4. Disclosure language stating that life insurance is not an investment or savings plan is required by the Pennsylvania Insurance Department. 40 Pennsylvania Statute section 277; 40 Pennsylvania Statute section 472.

5. The Pennsylvania Insurance Department specifically undertook an investigation of MetLife's sales practices in Pennsylvania and issued a lengthy and detailed report of its findings. See Report of Market Conduct Examination of the Metropolitan Life Insurance Company, December 23, 1993, at pp. 3839; 58; 71-72; 96-97; 155-160 (exhibit 1). The Insurance Department's effort in this regard is unequivocal evidence of its concern that Pennsylvania residents be protected from the fraudulent insurance practices detailed in the Report.[3]

3

The Coulters respectfully request that this Court take judicial notice of the Pennsylvania Insurance Department's Report and will provide a copy of the Report in its entirety if the Court so desires.

6. The Coulters, as representatives of all those persons similarly injured in Pennsylvania, brought a class action suit in state court, pursuant to statutory and common law of Pennsylvania (see Amended Coulter Complaint, exhibit 2), on behalf of Pennsylvania citizens injured by MetLife's failure to have the life insurance Policies Properly approved by the Pennsylvania Insurance Department Prior to selling the same, as well as MetLife's failure to effectuate disclosure as is required by the Pennsylvania Insurance Department and other fraudulent insurance practices. (See exhibit 1, at pp. 155-160.)

7. The Pennsylvania Consumer Protection Law allows for a private cause of action against insurance companies and sets forth that it is a violation to sell or represent that a good or service has approval which it does not have.

8. The Coulter Class, complaint also includes a sub-class of Pennsylvania residents who purchased MetLife life insurance which MetLife agents represent ad to be a retirement or savings plan with a life insurance component, which is also an alleged

violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law("CPL"). 73 Pennsylvania Statute 201-2, as well as the Pennsylvania Unfair Insurance Practices Act, 40 Pennsylvania Statute section 277, and is a violation of the Pennsylvania Bad Faith Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371.

9. Ronald and Anissa Coulter also filed a Class Action Complaint in the Court of Common Pleas of Allegheny County, on May 18, 1994, against individual defendants Michael George, former MetLife Training Director, and Gary Antonino, former MetLife Regional Vice-President, who formulated the "50/50 Savings Plan" scheme in Pennsylvania. The Class in that case is comprised of Pennsylvania residents who purchased MetLife life insurance, which, at the direction of Michael George and Gary Antonino, was represented by MetLife agents to be a retirement or savings plan with a life insurance component. This misrepresentation is an alleged violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pennsylvania Statute section 201-2; the Pennsylvania Bad Faith

Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371; and the Pennsylvania Insurance Department Act, 40 Pennsylvania Statutes section 277. The claims in class action against Michael George and Gary Antonino are based upon the identical transactions and occurrences as in the earlier filed class action.

10. The Coulter Class and sub-class members, all of whom executed contracts of insurance in Pennsylvania and were injured in Pennsylvania, are entitled to the application of Pennsylvania law to their causes of action. Any practice to the contrary is a denial of due process to the Coulter class and sub-class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In Phillips Petroleum, the United States Supreme Court declared that the application of Kansas law in a class action to claims which did not arise in Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits". Id. at 822.

11. Representative Coulter is a steel worker. The remainder of the class is constituted of those who purchased retirement plans with a life insurance component from MetLife and is not

limited to any particular profession or occupation.

12. In contrast, the Horton class action represents "primarily . . . licensed nurses . . . [and other health care professionals]" (Horton Class Action Complaint, 4/22/94, at pph. 19), who purchased MetLife life insurance which they each believed to a retirement or savings plan as a result of MetLife's agents' representations. (Horton Class Action Complaint at pph. 8.)

13. The Coulter class and sub-class seek relief on the basis of the Pennsylvania CPL, 73 Pennsylvania Statute section 201-1 et seq., the Pennsylvania Bad Faith Insurance Law, 42 Pennsylvania Code Statutes Annotated section 8371, and Pennsylvania fraud and contract law.

14. The Pennsylvania CPL empowers the Pennsylvania Attorney General to adopt such rules and regulations as may be necessary to protect Pennsylvania residents from fraud and unfair or deceptive business practices. A Pennsylvania purchaser of goods, such as each member of the Coulter class, also has a private right of action under the Pennsylvania CPL.

15. The Coulter Class and sub-class, by virtue of their

claims for relief pursuant to the Pennsylvania CPL and Bad Faith Insurance statute, have claims atypical of those of the Horton class as well as the class of any other state.

16. The Coulter Class became aware of the pending Horton class action and settlement agreement, and the Horton Class' attempt to encompass the Coulter Class when several Coulter Class members received opt-out notices on or about May 5, 1994.

17. The settlement reached between the Horton Class and MetLife is the product of the claims and defenses available under Florida law and does not adequately protect or serve the rights, interests and/or defenses of contracting parties in Pennsylvania, specifically, the Coulter Class.

18. For example, the Pennsylvania Insurance Department has already ordered the relief which was ordered in the Horton Class settlement, i.e., restitution of premiums paid as a result of MetLife's fraudulent business practices. See Order of Deputy Insurance Commissioner for Pennsylvania Insurance Department,, 2/11/94, (exhibit 3). Enforcing the settlement

agreement with regard to the Coulter Class is a clear abridgement of the class, rights to seek additional damages which are available under Pennsylvania law.

19. Accordingly, the proposed Horton Class Settlement agreement does not adequately protect the Coulter Class' rights and is therefore not in the best interests of the Coulter Class.

20. The Coulter Class has a right to intervene pursuant to Fed.R.Civ.P. 24 (a) (2), on the grounds that the Horton Class settlement may impair the Coulter Class from obtaining the relief to which it is entitled under Pennsylvania statutory and common law. The Coulter Class requests permissive intervention, pursuant to Fed.R.Civ.P. 24 (b) (2), because the Coulter Class' claims share a common question of law or fact with those advanced by the Horton Class; specifically, the fraudulent sales practices of MetLife.

21. The Horton Class action is founded upon Federal and Florida state RICO, breach of fiduciary duty and common law fraud Claims.

22. The allegations contained in the Horton Complaint and

Amended Complaint are dissimilar from the Coulter Class' claims against MetLife. The Horton Complaints purport to contain allegations common to all class members. However, they do not represent and/or contradict the Coulter Class, claims because:

1. the Horton class claims that the MetLife agents in Florida identified themselves to class members "nurse's representatives", Horton Complaint para. 4 (a); whereas Representative Coulter is a steel worker, and never, in the process of purchasing MetLife insurance, did he speak with anyone claiming to be a "steel workers representative"; in addition, the Coulter Class is not limited to any one profession or group;

2. that MetLife agents never referred to life insurance as such, but called it an "investment", Id. at para. 4(d); and that MetLife agents never disclosed that the product being purchased was life insurance, Id. at para. 8; in contrast, MetLife Account Representatives in Pennsylvania stated that the "50/50 plan" had a life insurance "component";

3. that MetLife agents perpetrated interstate wire and mail

fraud on the class; Id. at para. 23 (a) and (b); and that Florida RICO applies to the claims of the class, Id. at pares. 28-35; where the Coulter Class, claims are limited to events which occurred in Pennsylvania;

4. that a Florida agent's (Urso's) actions are common to all class members, Id. at para. 40; where the Coulter Class' claims are based on the representations and/or omissions made only by Pennsylvania Account Representatives and officers;

5. erroneously alleges federal RICO in connection with the class, insurance claims, contradictory to the McCarran-Ferguson Act which dictates that states should regulate their respective insurance industries and that federal causes of action are not applicable, Id. at paras. 20-27; but the Coulter Class has not alleged MetLife RICO violations in connection with its claims.

23. The requirement of Fed.R.Civ.P. 23 (a) (2) that there be "questions of law or fact common to the class" is not satisfied by the Horton Class representative.

24. The requirement of Fed.R.Civ.P. 23 (a) (3) that "the claims or defenses of the representative parties are typical of the

claims or defenses of the class" is not satisfied by the Horton Class representative.

25. The requirement of Fed.R.Civ.P. 23 (a) (4) that "the representative parties will fairly and adequately protect the interests of the class" is not satisfied by the Horton Class representative because the remedies available under Pennsylvania statutes and common law are not available to the Horton Class representative.

WHEREFORE, the plaintiffs respectfully request that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. If the Court does not permit severance, in the alternative the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

Respectfully submitted,

/S/_____

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CERTIFICATE OF SERVICE

I, Kenneth R. Behrend, hereby certify that a true and correct copy of the within Brief in Support of Plaintiffs, Motion for intervention was served this 20th day of May, 1994, upon the following by United States mail, first class postage prepaid addressed as follows:

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EXHIBIT 1

Excessive FIP ratios were noted for MetLife offices not identified by audit reports.

FINDINGS AND CONCLUSIONS

From analysis of MetLife consumer complaints, audit reports and FIP reports, it was clear management failed to utilize or integrate available internal control mechanisms to detect and control improper replacement activity.

-The impact of improper replacement activity upon complaint data, i.e. increased complaints, would not be expected to occur until such time as new policies failed to perform as solicited. Thus current complaints would not be expected to accurately mirror improper replacement activity as indicated by FIP ratios contemporary to complaints.

-MetLife complaint ratios, due to Replacement and Misrepresentation, of 75.98%, 81.03% and 72.80% in years 1990, 1991 and 1992 (see page 13) should have been cause for MetLife management to have examined those issues and to have scrutinized current audit and FIP reports.

-Access of MetLife corporate management to those reporting

vehicles indicates corporate managements awareness of replacement and misrepresentation as practices existing within the marketing strategy.

-other than audit reports, no MetLife corporate directives specifically identified replacement and misrepresentation issues requiring correction, within Pennsylvania.

-A December 16, 1992 letter by Richard N. Maurer, senior Vice President, Career Agency Operations of MetLife, directed to the MetLife field force, entitled "Honesty and Integrity: our Basis For Doing Business", reiterated MetLife's position requiring honest and ethical business conduct, indicating an awareness and concern of corporate MetLife as to practices of the field force.

-Sales representatives informed customers that existing policies were to be left in place until policy anniversary, and not immediately surrendered, in order to earn dividends.

-Insureds were instructed to disregard MetLife annual premium or lapse notices, which were explained by MetLife sales representatives as computer errors.

-MetLife checks for values taken from existing policies were routed through consumer homes in attempts to conceal replacement activity in conjunction with the sale of a new policy.

-Policies were not countersigned or dated at delivery in three (3) of the six (6) cited cases. Where delivered policies had been countersigned and dated at delivery, two (2) of the three (3) cases showed untimely delivery.

-FINDINGS AND CONCLUSIONS-

The observed pattern of deceptive solicitations and concealed replacements by MetLife sales representatives appears to have been for the purpose of increasing their commissions. Replacement solicitations were such as to cause policyholders, directly or indirectly, to believe that by using their existing policy values to purchase new insurance they were to receive paid-up policies, free coverage, or increased coverage at little or no additional cost.

Supporting the cover letter which accompanied the delivered policy were two (2) pages, one captioned "Individual Retirement

Benefit (I.R.B.) v.s. Individual Retirement Account (I.R.A.) Certificate of Deposit (C.D.)" and the other captioned "Metropolitan Investment Program". The captioned pages represented the Life to 95 policy as an "investment" and a "savings" program. It was falsely stated there was no "penalty for early withdrawal" and that the I.R.B. provided a 119 to 12-t Long Term Rate of Return". MetLife subsequently informed the Insurance Department that based upon the current values, as of December 1992, the policy would require additional premium payments for eight (8) years in order to reach a point where it would become self-supporting.

FINDINGS AND CONCLUSIONS

The Unfair Insurance Practices Act, No. 205, Section 5(a)(1)(vi) defines "Unfair Methods of Competition" and "Unfair or Deceptive Acts or Practices" as 11... Making, publishing, issuing or circulating any estimate, illustration, circular, statement, sales presentation, omission comparison which:" ... Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of

any insurance policy".

Section 637 of The Insurance Department Act prohibits misrepresentation of terms of policy and future dividends by agents, brokers, or solicitors. "No agent or solicitor of any insurance company, association, or exchange, and no insurance broker, shall issue, circulate, or use, or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, association, or exchange, or make an estimate, with intent to deceive, of the future dividends payable under such policy.,,

The referenced examples clearly demonstrate the noted pattern of sales practices and procedures used by MetLife sales representatives in utilizing sales illustrations based upon non-guaranteed projected values, and in many cases reinforcing the sales illustration values with cover letters containing misleading statements concerning the insurance policy being sold. approval, and that only the Tax Advantaged Bonus Plan for Nurses had penetrated into the Pennsylvania marketplace.

MetLife had allegedly recalled and destroyed all unapproved issues of the advertising. The MetLife corporate advertising was found consistent with other questioned advertising, in that it promoted the sale of whole life policies of insurance through solicitations promising earnings for retirement. While containing footnoted disclosure information, the various advertising pieces possessed a capacity, through stating precise earning values, to deceive consumers as to future earnings. Further, sales solicitation scripts employed by telemarketers clearly avoided the presentation of the Tax Advantaged Bonus Plan as insurance. The Tax Advantaged Bonus Plan was found to have evolved from 1991 to 1993 through the backing of MetLife Senior Vice President Richard N. Maurer and was, in fact, termed alternatively "The Maurer Plan". Charles M. Kavitsky, Territorial officer In Charge and Vice President, Mideastern Territory, was found to have coordinated and provided telemarketing support to MetLife sales representatives J. Joel Sherman, Richard Antonino, and Ronald Schram in Western Pennsylvania for the Tax Advantaged Bonus Plan.

-FINDINGS AND CONCLUSIONS-

Although the examination could not identify in detail the full extent of market penetration gained by MetLife through use of the various retirement/savings/investment plan solicitations, testimony of consumers and MetLife agents contacted during the examination indicated the misleading solicitation methods were used routinely to solicit Whole Life, Life to 95, and Life to 98 policies sold by MetLife. It is clear the various forms of advertising developed and used by MetLife sales representatives were designed to preclude proper disclosure of insurance sales to Pennsylvania consumers. It was also noted, while the focus of the examination was an a six (6) county Western Pennsylvania Region, the various marketing schemes and practices occurred throughout Pennsylvania.

X. FORMS FILING AND APPROVAL

Throughout the course of the examination, it was noted MetLife policies viewed in consumer homes, policy copies sent into the Department in response to mail surveys, and specimen policies provided by MetLife's Johnstown office differed from

the corresponding MetLife policy forms which were approved by, and on file with, the Department.

Whole Life Policy (7-87) and Life to 95 (57-87): Form approval was granted by the Department for both policy forms on June 2, 1987. Departmental approval was granted to MetLife for replacement of policy pages seven (7) and eight (8) for both forms on June 12, 1991. The approved replacement pages provided consumers notice that; "You may ask us to pay premiums with a combination of yearly dividends, the cash value to any paid-up additions and/or any dividend accumulations. As long as these values are great enough, out-of-pocket premiums need not be paid to keep your policy in force." All policy forms 57-87 and 7-87 encountered during the examination, issued subsequent to June 12, 1991, contained the earlier pages which had been replaced with the pages approved June 12, 1991.

Upon subsequent review by MetLife, it was reported to the Department a total of seventy thousand five hundred fifty-seven (70,557) incorrect Whole Life Policy (7-87) forms and ten thousand three hundred eighty-one (10,381 Life to 95

(57-87) policy forms had been issued to Pennsylvania consumers. As a result, these two (2) unapproved policy versions were issued to a total of eighty thousand nine hundred thirty-eight (80,938) consumers subsequent to June 12, 1991.

Survivorship Whole Life Policy (2J-90 PA):

Form approval was granted by the Department for this policy form on October 23, 1990. MetLife had initially submitted a generic policy form 2J-90 which was disapproved by the Department. Resubmission was made in the form of 2J-90 PA, which included revisions to pages one (1) and nine (9), from what was originally filed under form 2J-90, concerning Supplemental Insurance Benefit and Split Policy Option. Based upon the revisions, policy form 2J-90 PA was then approved. However, all Survivorship Whole Life policies (2J-90 PA) noted during the examination contained the original page one (1) contained in policy 2J-90 which was not approved for use in Pennsylvania.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighty-three (383)

unapproved versions of Survivorship Whole Life policy 2J-90 PA, containing the unapproved language on page one (1), had been issued to Pennsylvania consumers subsequent to October 23, 1990.

Flexible Premium Life Insurance Policy (7UL-90): Form approval was granted by the Department for this policy form on August 23, 1990. The initial MetLife submission was disapproved. Among the points of disapproval was the use of disclosure language on the Policy Specification page stating "The Planned Premium shown below may need to be increased to keep this policy and coverage in force." The Department required additional disclosure language "Even if coverage continues, the amount payable on the final date of policy nay have little or no value.", be added to the disclosure language submitted on the Specification Page in order to be considered for approval. MetLife subsequently submitted an amended Policy Specification page with the requested disclosure language, and Departmental approval was granted August 23, 1990.

All Flexible Premium Life Policies (7UL-90) noted during the

examination contained the limited, unapproved, disclosure language on the Policy Specification page and lacked the disclosure language required to obtain approval of the policy. This is of serious concern to the Department since it was noted throughout the examination the Flexible Premium Life Policy (9UL-90) was the primary policy sold using the "free insurance" and "paid-up insurance" solicitations. The absence of the required disclosure notice to policyholders, denied consumers full and fair disclosure concerning future premium payments and policy value. The lack of proper disclosure was found to be particularly serious in terms of damage to consumers in view of the manner in which the policies were solicited and sold.

Upon subsequent review by MetLife, it was reported to the Department a total of twenty nine thousand eight hundred forty-two (29,842) Flexible Premium Life Policies (7UL-90) were issued to Pennsylvania consumers with unapproved and incomplete disclosure language.

Multifunded Flexible Premium Life Policy (7.6FM-90): Both unisex and sex distinct versions of this policy were granted

Departmental approval on November 6, 1990. It was noted throughout the examination policy form 7.6FM-90, as actually issued to consumers, contained additional unapproved policy language on pages 1, 3, 3.1, and 5.

Upon subsequent review by MetLife, it was reported to the Department a total of six thousand five hundred forty-two (6,542) unapproved versions of the Multifunded Flexible Premium Life Policy (76.FM-90) were issued to Pennsylvania consumers subsequent to November 6, 1990.

Throughout the course of the examination, all policy forms noted in consumer homes, as well as duplicate policies provided by MetLife, at the Department's request, contained non-guaranteed illustrated value tables bound in with the policy pages. Since only guaranteed value tables are permitted to be included in a bound policy, each policy containing the non-guaranteed illustrated value tables constitutes an unapproved version of the policy.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighteen thousand eight

hundred forty-two (318,842) policies were issued to Pennsylvania consumers containing unapproved non-guaranteed illustrated value tables. According to MetLife, this occurred with all life and annuity policies issued from the Johnstown, Pennsylvania office since 1988.

- FINDINGS AND CONCLUSIONS -

In summation of the above findings, a total of four hundred thirty-six thousand five hundred forty-seven (436,547) unapproved policy forms were issued to Pennsylvania consumers. Section 354 of the Insurance Company Law (40 P.S.477b) specifically states it shall be unlawful for any insurance company doing business in the Commonwealth of Pennsylvania to issue, sell, or dispose of any policy or contract covering life insurance or annuities until the forms have been submitted to and formally approved by the Insurance Commissioner.

It should be noted that during the course of the examination MetLife cooperated fully in providing the Insurance

Department with all requested documents, and beginning inquiries into the various consumer complaints which surfaced during the examination in order to determine necessary corrective action required to make damaged consumers whole.

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No. 96-423

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RONALD COULTER AND ANISSA COULTER, et al.,

Petitioners,

SHERRY HORTON, et al.,

Plaintiffs-Respondents,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

This supplemental brief for petitioners is filed as authorized by Supreme Court Rule 15.8 for the purpose of respectfully calling to this Honorable Court's attention the applicability of the principles set forth in the majority opinion in Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, (1996), which was not

available to the writers of the petition for a writ of certiorari.

The Seminole Tribe case held that the Indian Commerce Clause, U.S.C.A. Const., Art. I, §8, cl.3, did not impliedly grant power to the Congress to abrogate the sovereign immunity of the States as confirmed by the Eleventh Amendment to the U.S. Constitution and that, therefore, the Congress could not abrogate the States' sovereign immunity by means of the Indian Gaming Regulatory Act, 25 U.S.C.A. §2710 et. seq.

The Seminole Tribe case also overruled Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S. Ct. 2373, 105 L.Ed.2d 1 (1989), which had held that the Interstate Commerce Clause of the U.S. Constitution, U.S.C.A Const., Art. I, §8, had impliedly granted the Congress power to abrogate the sovereign immunity of the States.

The foundation of these holdings is expressed in Seminole Tribe, 116 S.Ct. at page 1122 as follows:

> "...each State is a sovereign entity in our federal system..."

The majority opinion built upon this foundation by pointing

out in Seminole Tribe, 116 S.Ct. at page 1129 that:

> For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment.

The majority opinion then cites Principality of Monaco v. Mississippi, 292 U.S. 313, 54 S.Ct. 745, 78 L.Ed. 1282 (1934). This case stated in part as quoted in Seminole Tribe, 116, S. Ct. at page 1129:

> There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save when there has been a 'Surrender of this immunity in the plan of the convention.'

Again, in Footnote 15 in Seminole Tribe, 116 S.Ct. at page 1131, the majority opinion states in part that:

> ...the Constitution specifically recognizes the States as sovereign entities...

On this basis, the majority opinion held that the Indian Commerce Clause of the U.S. Constitution, U.S.C.A. Const. Art.

I, §8, cl.3, did not impliedly grant the Congress the authority to abrogate State sovereign immunity under the Eleventh Amendment and that the Seminole Tribe of Florida could not sue the State of Florida under the Indian Gaming Regulatory Act, 25 U.S.C.A. 2510 et. seq., even though the Congress attempted to abrogate State sovereign immunity in that Act.

The issue raised in the instant case is not whether Congress exercised a granted power of abrogation of State sovereignty; but rather, the issue is whether an affirmation of State sovereignty by the Congress in the McCarran-Ferguson Act has been violated by actions of a United States District Court. The McCarran-Ferguson Act provides that. "The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

In the instant case, the petitioners made every effort to protect their rights under the laws of their sovereign State, the Commonwealth of Pennsylvania, but were rejected at every step of the way by the Federal courts below.

The complete ignoring of the principle of State sovereignty

by the district court below is vividly illustrated by its statement, in denying relief to the petitioners, that it was applying:

> ...the federal law governing class certification and settlement approval.... The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles.... (App. 97a)

Thus, we have the incongruous result of the insurance regulatory laws of the sovereign States being abrogated by a Federal Rule of Civil Procedure.

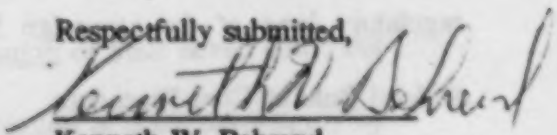
The paramount affront to State sovereignty was a national injunction issued by the United States District Court of Tampa, Florida (App.77a). Taken on its face, the injunction purports to forbid the petitioners from invoking in their sovereign State's courts the laws of their sovereign State, both common law and statutory laws, which restrict and regulate the business of insurance.

Petitioners submit that the Seminole Tribe case provides a solid foundation for reversing the Eleventh Circuit of Appeals in the instant case.

In particular, petitioners respectfully urge the Seminole

Tribe minority to join the Seminole Tribe majority in a unanimous holding that the States are sovereign entities in our Constitutional Federal form of government and that State laws cannot be nullified by actions of the Federal courts. This would be a tremendous contribution to the strength and clarity of jurisprudence in the United States.

Respectfully submitted,



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No. 96-423

Supreme Court, U.S.
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IN THE

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OCTOBER TERM, 1996

RONALD COULTER, ET AL.,

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—v.—

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners contend that this case presents the question whether the approval of a nationwide class action settlement resolving allegations of improper life insurance sales solicitations violates "judicial comity, States' sovereignty, and the McCarran-Ferguson Act." That question, however, was not raised in the courts below, is irrelevant to the issues in the case, and is not properly before the Court. The actual questions presented are:

1. Whether petitioners, by failing to raise their new arguments in the courts below, have waived their right to raise those issues in a petition for a writ of certiorari.

2. Whether petitioners' attacks on the district court's approval of the class action settlement are irrelevant to the orders actually appealed to and decided by the Court of Appeals, which affirmed four discrete orders that (*a*) denied the motion of petitioners Ronald and Anissa Coulter to "intervene" in the action, (*b*) denied the requests of the Coulters and other petitioners to exclude themselves from the class after the court-ordered opt-out deadline had passed, (*c*) dismissed without prejudice the requests of petitioners Edward and Paulette Beliunas, *et al.* for a declaration of their status as class members, and directed them to resubmit their motion — with evidentiary support — to a special master, and (*d*) denied the Coulters' motion for "injunctive relief," "remedial measures" and "sanctions" based on two Metropolitan Life Insurance Company sales representatives' allegedly improper contacts with absent potential class members.

3. Whether petitioners have shown any factual or legal arguments that would justify granting a writ of certiorari in light of the considerations noted in Sup. Ct. R. 10.

LIST OF PARTIES AND LIST OF PARENT COMPANIES AND SUBSIDIARIES

The names of the petitioners are listed on page ii of the Petition, except that "James Romano" was identified as "John Romano" in the district court. The Petition is moot as to petitioner Kamel, because she filed a timely request to exclude herself from the *Horton* settlement class.

The respondents are Sherry Horton, Joyce Armbruster and Deborah K. Spamer, individually and as representatives of a class of persons similarly situated; and Metropolitan Life Insurance Company. There were no other parties in the Court of Appeals.

Metropolitan Life Insurance Company has no parent company. It has no non-wholly owned subsidiaries other than the following:

Blodgett Holdings, Inc.

Briggs Holdings, Inc.

Briggs Plumbing Products, Inc.

Chart House Enterprises, Inc.

Cicero/Cermak Corporation

Cloverleaf Properties, Inc.

Coating Technologies International, Inc.

Dan River, Inc.

Eclipse Claim Services Inc.

First Health Associates, Inc.

Frialator International, Limited

Genesis Seguros de Retiro, S.A.

Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros

GS Blodgett Corporation

GS Blodgett Inc.

GS Blodgett International Ltd.

Interbroker, Correduria de Reaseguros, S.A.

Kolon-Met Life Insurance Company

Lone Star Industries, Inc.

Luther's Bar-B-Q, Inc.

Magikitch'n, Inc.

Met Life International Real Estate Equity Shares, Inc.

Metric Apartment Co-Investment Trust, Inc.

Metric Institutional Apartment Fund II, L.P.

Metropolitan Lloyds Insurance Company of Texas

Metropolitan Structures

Metropolitan Structures, Inc.

Metropolitan Structures West, Inc. d/b/a MS Management Services

Morguard Investments Limited

MS Management Services, L.P.

National Electronic Information Corporation

Pitco Frialator, Inc.

Santander Met, S.A.

Seguros Genesis, S.A. (Mexico)

Seguros Genesis, S.A. (Spain)

State Street Research Portfolios, Inc.

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BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully submits this brief in opposition to the Petition for a Writ of Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 78 F.3d 1533. [Appendix to Certiorari Petition ("Pet. App.") 4a.] The four district court orders appealed from, and the district court's separate findings of fact and conclusions of law in support of one of those orders, are unreported. [Appendix hereto ("App.") 5a, 9a, 32a, 42a, 45a.]

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND OTHER PROVISIONS INVOLVED

The statutes and rules involved are 28 U.S.C. § 1291 (appeals from final decisions of district courts) and Federal Rules of Civil Procedure 6(b) (enlargement of time) and 24 (intervention). Petitioners also purport to raise an argument under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. The text of those provisions is set out in the appendix to this brief. [App. 1a.]

STATEMENT OF THE CASE

This case arises out of a nationwide class action brought by respondents Sherry Horton, Joyce Armbruster and Deborah K. Spamer (the "*Horton* plaintiffs") against MetLife alleging misleading sales solicitations by MetLife sales representatives. The district court approved a settlement on October 25, 1994.

The Petition purports to attack the district court's order approving the settlement and certifying the settlement class. However, none of the petitioners appealed from that order. As the Court of Appeals noted, "[t]he [district] court's approval of the settlement is not an issue in these appeals." [Pet. App. 12a n.6.] The only orders that petitioners appealed were (*i*) an order denying the motion of petitioners Ronald and Anissa Coulter (the "Coulters") for leave to intervene so they could "sever" (*i.e.*, exclude *en masse*) all Pennsylvania residents from the class or seek appointment of their attorney as co-counsel to the class, (*ii*) an order denying the motions of the Coulters and 14 other petitioners (the "Late Exclusion Movants")[1] to be excluded from

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1. In addition to the Coulters, the Late Exclusion Movants are petitioners D. Connor, R. Connor, Johns, Kablach, Maharg, McConnell, (continued...)

the class after the opt-out deadline set by the court, (*iii*) an order effectively referring to a special master the motion of 24 other petitioners (the "Declaration Movants")[2] for a declaration as to whether they are class members, and (*iv*) an order denying the Coulters' motion for an injunction, sanctions and other relief based on allegedly improper contacts by two MetLife employees with certain potential members of the class.

A. The *Horton* Complaint

Respondents Sherry Horton and Joyce Armbruster commenced this action against MetLife on November 1, 1993, on behalf of a nationwide putative class.[3] The Complaint, as subsequently amended, alleged that certain MetLife sales representatives had sold whole life insurance policies as

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1. (...continued)
Myers, M. Palmer, T. Palmer, Rohm, J. Romano, Wise and Yokel. Petitioner Mary Romano joined the Late Exclusion Movants' notice of appeal, although she had not actually requested any relief from the district court. Petitioner Clarence Ridgeway had moved the district court for late exclusion, but he did not file a notice of appeal from the order [App. 65a] denying his late exclusion request. Instead, he purported to appeal from the separate order referring the motion of Edward Beliunas *et al.* to a special master. [App. 68a.]

2. The Declaration Movants were referred to in the Court of Appeals as the Beliunas Appellants. They are petitioners E. Beliunas, P. Beliunas, Brooks, Charles, Daughenbaugh, Freiwald, D. Heathcote, N. Heathcote, Hemcher, K. Johnson, M. Johnson, Kamel, E. Knorr, J. Knorr, G. Liptak, R. Liptak, Magnes, McCue, Ondrusek, Peterson, Rasel, Riehl, Valenta, C. Wiles and R. Wiles. Petitioner Ridgeway was not a Declaration Movant but was listed as an appellant in the Declaration Movants' notice of appeal.

3. Respondent Deborah K. Spamer subsequently was added as a named plaintiff in the Second Amended Complaint.

retirement or savings plans without adequately disclosing that the products sold were life insurance policies.

The *Horton* plaintiffs charged that "Met offices throughout the country" used the same alleged method to sell life insurance policies as savings or retirement plans "to licensed nurses" as well as "to others, including, but not limited to, chiropractors and small business employees in the State of Pennsylvania." [Record on Appeal ("R.") 1-17-8.] Those activities allegedly took place in various MetLife sales offices, including the Pittsburgh Sales Office in Upper St. Clair, Pennsylvania, and the Rick Urso & Associates Sales Office in Tampa, Florida (the "Tampa Sales Office"). The Complaint asserted claims under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), the Florida Civil Remedies for Criminal Practices Act, and the common law of fiduciary duty and fraud, and it sought rescission, restitution, treble damages, punitive damages, attorneys' fees and costs on behalf of the nationwide putative class.

B. The Coulters' Pennsylvania Action

On March 25, 1994, almost five months after the *Horton* case was filed, the Coulters sued MetLife in state court in Pennsylvania. [App. 13a, ¶ 14.] MetLife removed the case to federal court, where it currently is pending under the caption *Coulter v. Metropolitan Life Insurance Company*, No. 94-0629 (W.D. Pa.). The Coulters filed an amended complaint on May 13, 1994. [R. 5-77, Ex. 2.]

The *Coulter* case asserts claims on behalf of the Coulters, various other petitioners here, and a putative "subclass" consisting of Pennsylvania residents who purchased "savings" or "retirement" plans "which had life insurance components, which in reality were nothing more than whole life insurance policies." [*Id.*, Ex. 2 at 9-10, ¶ 16.] No class has been certified in that case; nor has the court appointed the Coulters or their attorneys as class representatives or class counsel. [App. 13a, ¶ 17.]

C. The *Horton* Class Settlement

After several months of negotiations, the *Horton* plaintiffs and MetLife entered into a settlement agreement on April 7, 1994. The proposed settlement offered each eligible class member full restitution in the form of either (*i*) a cash refund of all net premiums paid for the policy, plus interest, or (*ii*) the opportunity to exchange an in-force life insurance policy for an annuity funded in the amount of the cash refund. Alternatively, class members could retain their life insurance policies unchanged. In addition to the settlement relief, MetLife agreed to pay the *Horton* plaintiffs' attorneys' fees. [App. 49a-50a, ¶¶ 5-6.]

On April 22, 1994, the district court entered an order certifying a settlement class, appointing class counsel, preliminarily approving the proposed settlement, approving the form of notice to the settlement class, and scheduling a hearing to evaluate the fairness of the proposed settlement. The settlement class consists of

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the [Tampa Sales Office] between January 1, 1988 and October 31, 1993, or (b) from any other sales office of MetLife between January 1, 1990 and October 31, 1993. [R. 3-48-2; R. 11-225-1.]

Under the terms of the settlement agreement and the district court's order, class members could exclude themselves from the class by mailing an opt-out request to the settlement administrator no later than June 13, 1994. Class members who chose not to exclude themselves were given an opportunity to appear and object to the settlement. [App. 32a, 40a, 54a.]

On July 18, 1994, the district court held a full-day evidentiary hearing on the proposed settlement. The Coulters, who were among the very few persons to submit objections, appeared through counsel at the hearing and presented their arguments.[4] MetLife, the *Horton* plaintiffs, and the Florida Commissioner of Insurance all appeared through counsel and argued in favor of the settlement.

The Coulters contended that Pennsylvania residents somehow were not similarly situated to the remainder of the settlement class and should be excluded from the *Horton* settlement. The Coulters purported to base their arguments on the requirements of due process and Fed. R. Civ. P. 23. Neither the Coulters nor any other objector, however, contended that the settlement violated "judicial comity, States' sovereignty, [or] the McCarran-Ferguson Act," as they now argue in their Petition. [Pet. i; *see* Pet. App. 101a; R. 4-78-1.][5]

On October 25, 1994, the district court issued an order and final judgment under Fed. R. Civ. P. 54(b), accompanied by detailed findings of fact and conclusions of law, approving the settlement. [App. 48a.] The court rejected the Coulters' objections to the settlement [App. 59a, ¶ 39], including their

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4. The Coulters' objection [R. 5-119-1] simply incorporated the papers they had filed in support of their motion to "intervene." *See infra* Part D.

5. The Coulters contended that the McCarran-Ferguson Act barred the *Horton* plaintiffs' federal RICO claim [Pet. App. 111a; R. 4-78-7], but they never even suggested that the Act directly precluded the district court from exercising jurisdiction over and settling the state-law claims. As the district court correctly held, MetLife's McCarran-Ferguson Act defense goes to the merits of the RICO claim, not to the district court's subject matter jurisdiction to decide the claim or to adjudicate any other aspect of the case. [App. 57a, ¶ 32.]

argument that due process required the exclusion of Pennsylvania residents from the settlement [App. 26a, ¶ 53].

Neither the Coulters nor anyone else appealed from the final judgment or the order approving the settlement. Indeed, one of the Coulters' notices of appeal expressly stated that "[t]his is *not* an appeal from the Court's Order approving the Horton Class settlement." [App. 69a (emphasis added).]

D. The Coulters' Motion to "Intervene"

On May 20, 1994, after notice was sent to the *Horton* settlement class but before the hearing on settlement approval, the Coulters moved to "intervene" in this action, asserting that Pennsylvania residents' claims were not "typical" of those of the other class members. [Pet. App. 101a]. The Coulters asked the district court (*i*) to "sever" all Pennsylvania residents from the settlement class so the Coulters could seek to represent them in their putative class action in Pennsylvania or, alternatively, (*ii*) to allow the Coulters to "retain" their own counsel on behalf of the Pennsylvania members of the *Horton* class. [*Id.* 112a.]

Contrary to their assertion in the Petition [Pet. 4, 6], the Coulters never asked the district court to establish a "subclass" of the *Horton* class. [*See* Pet. App. 101a.][6] Nor did they argue that "judicial comity, States' sovereignty, [or] the McCarran-Ferguson Act" [Pet. i] precluded the federal court from approving a settlement of the *Horton* plaintiffs' state-law claims.

The district court heard argument on the Coulters' "intervention" motion at the settlement hearing and orally denied it. On October 25, 1994, the day it approved the settlement, the court issued an order [App. 5a], accompanied by detailed findings of fact and conclusions of law [App. 9a], denying the Coulters'

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6. The Coulters did, however, refer to a so-called "subclass" in their Pennsylvania putative class action.

"intervention" motion as well as motions filed by certain other would-be intervenors who did not appeal.

The court found that the Coulters, as settlement class members, had a legally protectable interest in the action. However, the court concluded that the Coulters could not intervene as of right under Fed. R. Civ. P. 24(a) because (*i*) disposition of the action would not impair or impede their interests, as the Coulters could adequately protect themselves either by opting out and litigating separately or by remaining in the class and objecting to the settlement, and (*ii*) the Coulters were adequately represented by the *Horton* plaintiffs, who asserted the same interests. [App. 23a-24a, ¶¶ 43-47.][7]

The court also concluded that the Coulters lacked standing to move to "sever" other Pennsylvania residents from the class, because the Coulters had no right to speak for anyone but themselves. They therefore could not unilaterally deny other Pennsylvania residents the benefits of the proposed settlement. [App. 25a, ¶ 51.] As the court held, the Coulters

> have not been determined to be adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege. [App. 26a, ¶ 52.]

In addition, the court rejected the Coulters' claim that failure to "sever" all Pennsylvania residents from the class would violate those persons' due process rights. [*Id.* ¶ 53.]

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7. As an additional ground for its decision, the court held that the Coulters could not intervene because they had not attached to their motion a pleading setting forth the claims or defenses on which intervention was sought, as required by Fed. R. Civ. P. 24(c). In fact, the Coulters did not assert any claims or defenses at all. [App. 26a, ¶ 54.]

The court exercised its discretion to deny permissive intervention under Fed. R. Civ. P. 24(b), because the procedures for objecting to the settlement or opting out of the class "already offer the Coulters all the relief they seek for themselves and other Pennsylvania settlement class members." [App. 29a, ¶ 64.] Permissive intervention "thus would serve no purpose." [*Id.*]

E. The Motions for Late Exclusion

After the district court orally denied the Coulters' "intervention" motion at the July 18, 1994 hearing, the Coulters' attorney for the first time asked the district court to exclude his clients from the settlement class, even though the June 13, 1994 opt-out deadline had passed. A written exclusion request followed on September 21, 1994. At various other times after June 13, 1994, the other Late Exclusion Movants, represented by the same attorneys who represent the Coulters, also sought relief from the opt-out deadline. The Coulters and the other movants raised various arguments about an alleged lack or inadequacy of notice and alleged clerical error by their attorneys. But no movant objected on the grounds of "judicial comity, States' sovereignty [or] the McCarran-Ferguson Act." [Pet. i.]

The district court denied the various motions in an order dated October 25, 1994, concluding that none of the Late Exclusion Movants had established excusable neglect under Fed. R. Civ. P. 6(b)(2) for not filing timely exclusion requests. [App. 32a]. The court noted that allowing late opt-outs would severely prejudice MetLife's rights under the Settlement Agreement and that the movants would suffer little or no prejudice by remaining in the class, because MetLife had offered to allow them to file late proofs of claim to participate in the settlement and obtain full restitution plus interest. [App. 33a-34a.]

F. The Motion for a Declaration as to Class Membership

On September 21, 1994, the Declaration Movants, represented by the same attorneys who represent the Coulters, moved the district court for a declaration that they were not members of the settlement class. The motion, which was not supported by affidavits or other evidence in the record, was based on counsel's assertion that the movants had not received notice of the action and on a number of factual arguments about the alleged circumstances in which the movants had purchased their MetLife insurance policies. Once again, the motion said absolutely nothing about "judicial comity, States' sovereignty [or] the McCarran-Ferguson Act." [Pet. i.]

The district court recognized that "whether a policyholder is a class member is a fact-specific inquiry that must be accomplished on a case-by-case basis." [App. 43a.] The court therefore denied the Declaration Movants' motion without prejudice, appointed a special master, and directed "any petitioner wishing to obtain a declaration of their status in relation to this class action [to] file [with the special master] on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence." [*Id.*] The court also noted that the Settlement Agreement had contemplated the use of a special master to resolve individual class members' disputed claims. [*Id.*]

The Declaration Movants did not present any renewed petitions to the district court or the special master. Nor did they seek reconsideration or object to the reference to the master.

G. The "Remedial Measures" Motion

On October 4, 1994, the Coulters filed another motion, titled "Petition for Injunctive Relief Pursuant to F.R.C.P. 23(d) for Restraint of Improper Communications and For Remedial Measures to Rectify Defendant's Improper Contacts in Violation of Local Rule 4.04, and for Sanctions." The motion, unsupported by affidavits, alleged that two MetLife sales representa-

tives had engaged in "improper" communications with certain potential class members (but not with the Coulters) and stated, without citing evidence, that "MetLife and/or its counsel" were permitting "MetLife and/or its agents" to "sabotage[]" the class notice. [R. 9-188-2, -3.] The Coulters sought broad discovery, new notice to the class, appointment of their attorney as co-counsel for the class, and attorneys' fees. Once again, the motion said not a word about "judicial comity, States' sovereignty [or] the McCarran-Ferguson Act." [Pet. i.]

Both MetLife and the *Horton* plaintiffs (who are the court-appointed class representatives) opposed the motion. Noting the absence of evidentiary support for the Coulters' motion, the district court concluded that it "appears to have been filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney." [App. 46a.] Because it found the petition "unworthy of additional consideration, and because the Coulters and their attorney have consumed already an inordinate amount of the parties' and the Court's resources," the court denied the motion for the reasons stated in the responses filed by the *Horton* plaintiffs and MetLife. [*Id.*] In addition, even though MetLife had not sought sanctions, the court *sua sponte*

> admonish[ed] the Coulters and their attorney . . . [to] remain mindful of the provisions of Rule 11, Federal Rules of Civil Procedure. Rule 11 precludes the filing of superfluous motions for the purposes of wasting valuable resources, perpetuating undue delay, and serving illegitimate self-interests. If applied to the papers filed by the Coulters and their attorney, Rule 11 might well trigger relief markedly different in both effect and object from that which they proposed or contemplated. [App. 46a-47a.]

H. The Appeals

The Coulters, the other Late Exclusion Movants and the Declaration Movants filed notices of appeal to the Eleventh Circuit from the four orders denying their respective motions. [App. 66a, 67a, 68a, 69a.] The Court of Appeals consolidated the four appeals. Neither the petitioners nor any other class member appealed the order certifying the settlement class and approving the settlement. The Court of Appeals thus noted that "[t]he court's approval of the settlement is not an issue in these appeals." [Pet. App. 12a n.6.]

Petitioners' appeals repeated essentially the same arguments raised in the district court. As in the district court, the Coulters relied on due process and Fed. R. Civ. P. 23. They made no reference to "judicial comity," "States' sovereignty" or the McCarran-Ferguson Act. [Pet. i.][8]

The Court of Appeals found all four appeals to be without merit. *First*, the court concluded that the denial of the Coulters' "intervention" motion was proper because the Coulters and their counsel had not been certified as representatives of any purported class of Pennsylvania residents and therefore had no right to speak for such persons. [Pet. App. 15a.]

Second, the Court of Appeals held that the district court had not abused its discretion in denying the Late Exclusion Movants' motion "[b]ecause the Coulters made a tactical decision not to opt out in time, and the other movants failed to meet the 'excusable neglect' standard of Rule 6(b)(2)." [*Id.* 15a-16a.]

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8. In fact, petitioners abandoned their previous argument that the McCarran-Ferguson Act deprived the district court of jurisdiction over the *Horton* plaintiffs' RICO claim. They sought to revive that argument belatedly in their proposed *second* petition for rehearing [App. 34a], which the Court of Appeals denied them leave to file.

Third, the Eleventh Circuit ruled that the order denying the Declaration Movants' motion without prejudice and referring the issue to a special master was interlocutory and unappealable. But in any event, "[a]ssuming for the sake of argument that the disposition is appealable," the Court of Appeals concluded that the district court's order was "entirely reasonable" and "no abuse of discretion." [*Id.* 17a.]

Fourth, the court held that the district court properly had denied the Coulters' "remedial measures" motion because "the Coulters lacked standing to seek the requested relief." [*Id.* 17a.] In addition, the court ruled that even if the Coulters had standing, "the district court did not abuse its discretion in denying the relief because the Coulters failed to demonstrate the alleged misconduct occurred." [*Id.* 17a-18a.]

The Court of Appeals concluded that the appeals "not only lack merit, they are frivolous." The court awarded double costs and attorneys' fees against petitioners. [*Id.* 18a.]

REASONS FOR DENYING THE WRIT

The Petition is entirely improper. None of the issues it seeks to raise in this Court was asserted below, and none of the issues raised and decided below is asserted in the Petition. Accordingly, *no* issues are properly before this Court, and certiorari should be denied for this reason alone. *None* of the considerations in Sup. Ct. R. 10 applies to this Petition for certiorari. In any event, all of the arguments raised here and in the lower courts are without merit, and none of them warrants this Court's attention in this case.

I.

NONE OF THE ISSUES IN THE PETITION WAS RAISED IN THE COURTS BELOW.

Apparently acknowledging the frivolousness of the arguments they asserted in the lower courts, petitioners have now concocted new arguments never raised below. In the lower courts, petitioners raised a variety of contentions based on the Fifth Amendment's Due Process Clause and Fed. R. Civ. P. 23. They now have suddenly attempted to turn this case into one about "judicial comity, States' sovereignty, and the McCarran-Ferguson Act." [Pet. i.] *None* of these issues was raised in the lower courts.

The settlement of this nationwide class action, which was the product of arm's-length negotiations between the *Horton* plaintiffs and MetLife, provides eligible class members with full restitution of all monies paid plus interest, without any deduction for class attorneys' fees. [App. 49a-50a, 56a-57a, ¶¶ 5-6, 25, 28.] Practically from the moment they received notice of the proposed settlement, however, the Coulters and their attorneys have sought to disrupt the federal proceedings in Florida so they might litigate their own putative class action in Pennsylvania.

In the courts below, the Coulters and their counsel raised the meritless argument that Pennsylvania law somehow is so different from the law of other states that a proposed settlement offering full restitution plus interest would be unfair to Pennsylvania residents (who in any event could opt out of the class if they did not like the proposed settlement relief). [*E.g.*, Pet. App. 108a-109a.] The Coulters and other petitioners also raised an equally meritless challenge to the adequacy of class notice and alleged, without evidentiary support, that MetLife had attempted to "sabotage" the class notice through purportedly improper communications with potential class members.

Petitioners thus based their various motions on the provisions of Rule 23 and principles of due process.

No hint of their current argument about "judicial comity," "States' sovereignty" or the McCarran-Ferguson Act can be found either in petitioners' district court papers or in their briefs on the merits of their appeals. Indeed, *not even one* of the cases or federal statutes cited in the Petition appeared in petitioners' opening brief or reply brief in the Court of Appeals. Petitioners' current arguments first surfaced either in the present Petition or in their proposed *second* petition for rehearing in the Court of Appeals, which that court refused to accept.[9]

"It is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990); *see* Robert L. Stern *et al.*, *Supreme Court Practice and Procedure* § 6.26 at 344 (7th ed. 1993). Because petitioners did not timely raise any of their present arguments in the lower courts, they have waived those

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9. The district court's order permanently enjoining settlement class members from pursuing related litigation in other forums [Pet. 9; Pet. App. 77a] also was not at issue below. That order was entered on November 8, 1995, after this case was briefed and argued in the Court of Appeals. The order therefore is not part of the record in this case and was not before the Eleventh Circuit.

Petitioners' allegations about a supplemental notice sent to certain class members in August 1996 [Pet. 8, 19] — well after petitioners' appeals were briefed, argued and decided — also are outside the record and were not properly presented to the Eleventh Circuit. In any event, the fact that MetLife notified the district court of an inadvertent error in the original class notice list and volunteered to send new notice to those potential class members inadvertently omitted from the original mailing should have no bearing on the present Petition except in one respect. Petitioner Kamel was a member of the group sent notice in 1996, and she filed an exclusion request within the new opt-out period. She therefore is no longer bound by the class settlement, and the Petition is moot as to her.

arguments, and the Court need look no further to deny their Petition.

II.

NONE OF THE ISSUES LITIGATED BELOW IS RAISED IN THE PETITION.

As the Petition asserts only arguments that were not raised below, it fails to seek review of any of the issues actually litigated in the Court of Appeals. The only issues appealed to and decided by the Eleventh Circuit were the district court's four orders (*i*) denying intervention, (*ii*) denying the motions for late exclusion, (*iii*) denying without prejudice the motion for a declaration of class membership and referring the issue to a special master, and (*iv*) denying the motion for "remedial measures" concerning allegedly improper contacts with potential class members. The argument section of the Petition omits any reference to those orders or to the Court of Appeals' affirmance of them. Because petitioners have not raised any issues relating to those orders, the Petition presents no appellate determination for this Court to review.

The Petition does complain about the district court's separate order certifying the settlement class and approving the settlement. But petitioners did not appeal from that order, and the Court of Appeals expressly did not review it. [Pet. App. 12a n.6.] That order therefore is not before this Court, just as it was not before the Court of Appeals. The decision in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *cert. granted sub nom. Amchem Products, Inc. v. Windsor*, 65 U.S.L.W. 3338 (U.S. Nov. 1, 1996) (No. 96-270), where the issue of class certification *was* presented to the appellate court, thus is completely irrelevant here.

Moreover, even if petitioners somehow could raise any arguments concerning the propriety of the class settlement, the Court of Appeals' judgment would remain intact. The Eleventh

Circuit did not base its affirmance of the four appealed orders on the separate, unappealed order approving the settlement.

The Court of Appeals affirmed the order denying "intervention" because the Coulters could adequately protect their own interests by opting out or by appearing and objecting (as they in fact did). In addition, the Coulters could not "intervene" for the purpose of "severing" the claims of other Pennsylvania residents, because the Coulters had not been appointed to represent any such persons. [App. 26a, ¶ 52; Pet. App. 15a.] Thus, the Coulters did not meet the requirements for intervention as of right under Fed. R. Civ. P. 24(a), and there was no point in allowing them to intervene by permission under Fed. R. Civ. P. 24(b). [App. 29a, ¶ 64.] These determinations were unrelated to the district court's separate approval of the settlement under Fed. R. Civ. P. 23(e).

The denial of the Late Exclusion Movants' motions also did not depend on the approval of the settlement. None of the motions questioned the propriety of the settlement order or sought to reopen the issue. The district court denied the motions solely because the movants had failed to demonstrate excusable neglect as required by Fed. R. Civ. P. 6(b) [App. 34a-41a], and the Court of Appeals affirmed on the same grounds [Pet. App. 15a-16a].

Nor did the order on the Declaration Movants' motion for a declaration of their class membership involve any analysis of the settlement. The district court simply denied the motion without prejudice and ordered the movants to refile it before a special master, with appropriate evidentiary support for each movant's allegations. The Court of Appeals held that the district court's order was not "final" and therefore was not appealable under 28 U.S.C. § 1291. [Pet. App. 16a.] In the alternative, the court ruled that the order fell within the district court's discretion "to fashion an efficient and economic solution to the problem the movants presented." [*Id.* 17a.]

Finally, the district court's denial of the Coulters' "remedial measures" motion, and the Court of Appeals' affirmance of that order, was based on the Coulters' lack of standing to bring the motion on behalf of absent class members and on the lack of any evidentiary support for their allegations of misconduct. [App. 46a; Pet. App. 17a-18a]. Again, the approval of the settlement simply was not at issue.

Accordingly, despite their insistence that "[i]t is critically important for courts, litigants and insurance regulators across the country to know whether the Eleventh Circuit's decision is right or wrong" [Pet. 10], petitioners have not presented any arguments that would have any impact on the correctness of that court's judgment. The fact-specific, run-of-the-mill procedural issues actually decided by the Court of Appeals — denial of intervention, denial of late opt-out requests, reference to a special master, and denial of "remedial relief" based on a lack of evidence — hold no importance for the future of insurance regulation or policy, or indeed any other area of law. The petition for certiorari should be denied.

III.

THERE IS NO MERIT TO THE ARGUMENTS IN THE PETITION.

Even if the district court's approval of the settlement somehow were before this Court, and even if petitioners somehow could raise for the first time their McCarran-Ferguson Act arguments, those newly invented contentions still would not provide any basis for granting certiorari. Petitioners' arguments are more than wrong; they are frivolous.

Petitioners' arguments boil down to the assertion that the McCarran-Ferguson Act strips federal courts of *subject matter jurisdiction* to decide insurance-related cases and to approve class action settlements involving state-law insurance issues. This contention is plainly incorrect and frivolous as a matter of law. *See, e.g., Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d

233, 237 (2d Cir. 1975) ("The fact that defendant's conduct, by reason of the exemption to the antitrust laws provided by the McCarran-Ferguson Act, does not violate those statutes does not deprive the court of jurisdiction to hear the case").[10] Indeed, federal courts routinely decide cases involving issues of state insurance law. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1720 (1996) (noting federal courts' "'virtually unflagging obligation . . . to exercise the jurisdiction given them,'" and reversing order that had remanded insurance-related case to state court based on abstention).

The McCarran-Ferguson Act provides only that federal law does not preempt "any law enacted by any State for the purpose of regulating the business of insurance" unless the federal law specifically relates to the business of insurance. 15 U.S.C. § 1012(b). But the statute nowhere states or implies that a federal court lacks the power to apply the applicable substantive law, whether federal or state law.

Nor does the McCarran-Ferguson Act raise any substantive preemption issue here, because the district court's approval of the class action settlement under Fed. R. Civ. P. 23 is not inconsistent with Pennsylvania insurance law. Although petitioners contend that the settlement approval "override[s]"

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10. *See also United States v. Cavin*, 39 F.3d 1299, 1305 (5th Cir. 1994) (following *Dexter*, and holding that "McCarran-Ferguson does not erect a jurisdictional bar"); *Martin Ins. Agency, Inc. v. Prudential Reinsurance Co.*, 910 F.2d 249, 254 (5th Cir. 1990) (McCarran-Ferguson Act "did not remove diversity jurisdiction from the federal courts in insurance matters"); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir. 1988) (Act "did not intend to divest federal courts of the right to apply state law regarding the regulation of insurers in appropriate diversity proceedings"), *cert. denied*, 489 U.S. 1096 (1989); *Seasongood v. K & K Ins. Agency*, 548 F.2d 729, 731 n.1 (8th Cir. 1977) (dismissal based on McCarran-Ferguson Act is "for failure to state a claim and not for lack of jurisdiction").

state law regulating insurance, they point to nothing in the law of Pennsylvania or any other state that would preclude the settlement of insurance-related disputes. To the contrary, the Pennsylvania Supreme Court has held in an insurance case that "it is fundamental that the law favors settlements." *Gray v. Nationwide Mut. Ins. Co.*, 223 A.2d 8, 13 (Pa. 1966) (quotation marks omitted); *see also Rothman v. Fillette*, 469 A.2d 543, 546 (Pa. 1983) ("Voluntary settlement of civil controversies is in high judicial favor") (quotation marks omitted).

Contrary to petitioners' assertions [Pet. 11], the class settlement does not attempt to "regulate" the sale of insurance policies in Pennsylvania or any other state. Rather, it simply provides for the compromise and settlement of existing claims in exchange for the payment of money or the issuance of new annuity contracts. Nor does the settlement involve any continuing relief applicable to future insurance policy sales; it affects only claims arising from policies purchased by class members before October 31, 1993. [R. 2-35-6.]

In addition, nothing in the settlement precludes state regulators from enforcing state insurance laws and regulations.[11] In fact, the same conduct alleged in the *Horton* complaint was the subject of investigations by and settlements with state insurance regulators in various states. [App. 64a, ¶ 51; R. 13-27, -101, -197.] And the Florida Insurance Commissioner's counsel appeared at the settlement hearing and supported the proposed settlement. Petitioners' argument that the settlement "allows the insurance companies to escape the regulatory schemes and state-

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11. The Eleventh Amendment sovereign immunity concerns of *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), relied on in petitioners' supplemental brief, are completely irrelevant to this case because no state or state official is a defendant here. Moreover, as explained in the text, the district court's orders did not interfere in any way with state regulators' prerogatives or with what petitioners call "state sovereignty."

by-state scrutiny of the insurance commissioners" [Pet. 11] is therefore baseless.[12]

Finally, there is no inconsistency between the settlement relief and the remedies that petitioners claim would have been available to them under Pennsylvania law had they elected to opt out of, or had they been "severed" from, the settlement class. The district court considered and rejected all of the Coulters' arguments [App. 59a, ¶ 39], including their erroneous contention that Pennsylvania law was sufficiently different from laws of other states to require the exclusion of all Pennsylvania residents from the settlement [App. 26a, ¶ 53]. Moreover, the same remedies that petitioners contend were available under Pennsylvania law — "compensatory, statutory, and punitive damages" [Pet. 12] — also were potentially available under the RICO, statutory and common-law claims pleaded in this case. If the settlement for full restitution plus interest was fair and adequate in light of the pleaded claims (and it certainly was), it also was fair and adequate when viewed in light of the possible relief under Pennsylvania law.

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12. Because the settlement in no way interferes with any state's ability to regulate insurance conduct within its borders, petitioners' reliance on certain language in *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996), is misguided. Moreover, petitioners misread *BMW*. That case, which was an individual action litigated in a state court, certainly did not hold that a *federal court* cannot approve a nationwide *class action settlement* involving state-law claims for compensatory and punitive damages. The language that petitioners quote — stating that due-process considerations preclude a state court from punishing out-of-state conduct that was lawful where it occurred, *id.* at 1597 — has nothing to do with "judicial comity" as between state and federal courts, or with the power of federal courts to hear cases involving state-law claims for punitive damages.

For all these reasons, petitioners' contention that the district court failed to respect "[p]rinciples of comity and states' sovereignty" [Pet. 16] is meritless.

IV.

THERE IS NO MERIT TO THE ARGUMENTS THAT PETITIONERS ACTUALLY RAISED BELOW.

As noted above, the Petition does not include any of the issues petitioners raised in the Court of Appeals, and the Eleventh Circuit's rulings thus are not properly before this Court. But even if the Petition had raised those issues, they would not provide any basis for granting certiorari. The rulings of the district court and the Court of Appeals are clearly correct and present no difficult or unsettled legal issues, much less "compelling reasons" for granting certiorari. Sup. Ct. R. 10. The Eleventh Circuit's decision involved a straightforward and uncomplicated application of 28 U.S.C. § 1291's finality requirement, the doctrine of standing, and the procedural rules governing intervention and enlargements of time.

A. The Motion for "Intervention" Was Properly Denied.

In the absence of a statute expressly conferring a right to intervene, an applicant may intervene as of right only if

> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). Rule 24(a) requires a would-be intervenor to demonstrate, among other things, a "significantly protectable interest" that would be impaired by a judgment in the action. *Donaldson v. United States*, 400 U.S. 517, 551 (1971) (affirming denial of intervention because would-be intervenor had no "significantly protectable interest" in the action).

The district court and the Court of Appeals correctly concluded that intervention was not necessary to protect the Coulters' interests. The Coulters — like all other potential class members — already had the right to exclude themselves from the settlement class and pursue an action in Pennsylvania, as they allegedly wished to do. Class members who can fully protect their interests by opting out of the class and filing a separate suit have no right to intervene under Rule 24(a), because the pendency of the class action does not "impair or impede [their] ability to protect [those] interest[s]," Fed. R. Civ. P. 24(a)(2). *See, e.g., Roberts v. Heim*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) (denying intervention where class members could protect rights by opting out); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 621 (C.D. Cal. 1969) (denying intervention because consent decree did not affect "the rights of the [applicants] to prosecute their own claims"), *appeal dismissed*, 397 U.S. 248 (1970).

The Coulters did not need to intervene in order to appear through the attorney of their choice and object to the settlement. They already had those rights, which they fully exercised. The Coulters filed numerous, voluminous submissions with the district court; they filed a notice of intention to appear and object to the settlement; their attorney presented his arguments at the July 18, 1994 hearing; and the court fully considered those points before it finally certified the class and approved the settlement. Having chosen to appear and object through their own counsel, rather than exclude themselves from the class, the Coulters cannot claim that the denial of intervention prevented them from protecting their rights. *See, e.g., Webcor Elecs. v. Whiting*, 101 F.R.D. 461, 466 (D. Del. 1984) (denying intervention to shareholders who could object at settlement hearing); *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801, 829-30 (N.D.

Cal. 1979) (denying intervention to class members who had had opportunity to object at settlement hearing), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 295 (N.D. Cal. 1976) (same), *aff'd sub nom. Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).[13]

In addition, the Coulters' interests were adequately represented by the court-appointed class representatives and class counsel. As the district court correctly found, "[t]he Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations . . . ." [App. 24a, ¶ 46.] And like the Coulters, the class representatives sought to recover the maximum amount of money from MetLife. "When the party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance." *United States v. Franklin Parish School Bd.*, 47 F.3d 755, 757 (5th Cir. 1995) (quotation marks omitted). The Coulters utterly failed to make any such showing.

Moreover, as the district court and the Court of Appeals concluded, the Coulters had no standing to "intervene" on behalf of any Pennsylvania residents other than themselves. [App. 25a-26a, ¶¶ 51-52; Pet. App. 15a.] No court has appointed the Coulters as representatives of any class or designated their attorney as class counsel. [Pet. App. 15a.] *See, e.g., Resnick v. American Dental Ass'n*, 95 F.R.D. 372, 376 n.6 (N.D. Ill. 1982) ("Before [class] certification . . . the potential class members are not yet 'represented by' counsel."); 2 Carl Robert Aron *et al.*, *Class Actions* § 22:07 at 22 (1987) ("the attorney-client rela-

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13. For the same reasons, the district court did not abuse its discretion in denying permissive intervention under Fed. R. Civ. P. 24(b)(2), because the Coulters could fully protect their interests by opting out or objecting. [App. 29a, ¶ 64.]

tionship is deemed to arise upon and by reason of [class] certification"). The Coulters therefore had no standing to "intervene" to assert the alleged rights of absent putative class members — or to deprive other Pennsylvania residents of the benefits of the settlement without their knowledge or consent. *See, e.g., Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on individual basis); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 481 (S.D.N.Y. 1984) (holding that even if residents of particular state "have special or unique state law claims, the Court cannot find that these potential class members should be denied access to settlement information or denied the opportunity to decide for themselves whether or not to opt out of the proposed class"); 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 16.16, at 16-90 (3d ed. 1992) ("the decision to exercise the right of exclusion in a [Rule] 23(b)(3) action is an *individual decision* of each class member and may not be usurped by the class representative or class counsel") (emphasis added).

The denial of the Coulters' "intervention" motion thus involved a straightforward application of Fed. R. Civ. P. 24 and the law of standing. The ruling did not involve any difficult or important issues of law that should be decided by this Court.

B. The Denial of the Motions for Late Exclusion Was Within the District Court's Sound Discretion.

The denial of the Late Exclusion Movants' motion also involved a simple, fact-specific application of the Federal Rules of Civil Procedure. Rule 6(b)(2) allows a court, "in its discretion," to extend a time limit established by rule or order "upon motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect." Whether the neglect is "excusable" turns on "all relevant circumstances surrounding the party's omission," *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 395 (1993) (applying excusable neglect standard to Fed. R. Bankr. P. 9006(b)), and thus requires a case-by-case exercise of

discretion by the trial court, *see, e.g.*, 2 James W. Moore *et al.*, *Moore's Federal Practice* ¶ 6.08, at 6-84.1 (2d ed. 1996).

The district court here acted well within its discretion under Rule 6(b)(2) in concluding that none of the Late Exclusion Movants had shown that his or her failure to file a timely exclusion request resulted from "excusable neglect." The court carefully weighed (*i*) the parties' interests in finality and in consolidating claims in a single forum against (*ii*) any prejudice to the movants if their requests were denied and their claims were resolved in the class action. [App. 33a-34a.] *See, e.g., National Student Mktg. Litig. v. Barnes Plaintiffs*, 530 F.2d 1012, 1014 (D.C. Cir. 1976) (class member seeking to opt out beyond deadline must "establish excusable neglect sufficient to outweigh the interest in the finality and repose of judicial orders"); *In re VMS Sec. Litig.*, 145 F.R.D. 458, 462 (N.D. Ill. 1992) (same), *aff'd in part and vacated in part*, 21 F.3d 139 (7th Cir. 1994). The court found no excusable neglect and also concluded that the movants would not be substantially prejudiced by the denial of their motion because MetLife had offered to allow them to file claims for full restitution even though the claim-filing period had ended. [App. 33a-34a.]

The Court of Appeals correctly held that the district court's decision, which was based on the facts of the Late Exclusion Movants' individual applications, was not an abuse of discretion. [Pet. App. 15a-16a.] Thus, even if petitioners had raised this issue here, there would be no reason for this Court to review that fact-bound determination, which presents no "important question of federal law" that needs to be settled by this Court. Sup. Ct. R. 10(c).

C. The Order Referring the Motion for a Declaration to a Special Master Is Interlocutory and Unappealable, and in Any Event Was Within the District Court's Sound Discretion.

The Declaration Movants asked the district court for a "declaration that they are not *Horton* Class members." [R. 9-178-1.] However, they did not submit any affidavits or other evidence with their motion papers, even though the declaration they sought required various factual determinations about the nature of their claims and the circumstances of their insurance transactions. The district court therefore dismissed their motion "without prejudice" and directed "any petitioner wishing to obtain a declaration of their status in relation to this class action [to] file on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence." [App. 43a.] The court referred all such petitions to a special master appointed under Fed. R. Civ. P. 53. [*Id.*] Instead of submitting their claims to the special master, the Declaration Movants appealed. [App. 68a.]

"[A] decision is ordinarily considered final and appealable under § 1291 only if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1718 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Because the district court's denial of petitioners' motion contemplated further proceedings in this case, the Court of Appeals correctly concluded that the ruling was not appealable as a "final decision" under 28 U.S.C. § 1291. [Pet. App. 17a.] *See, e.g., Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290-91 & n.4 (1940) (order referring issue to master is interlocutory and not appealable); *Peters v. Welsh Dev. Agency*, 920 F.2d 438, 439-40 (7th Cir. 1990) (dismissal of complaint without prejudice and subject to reinstatement when plaintiff met specified conditions was interlocutory and not appealable).

Even if the district court's order were appealable, the decision to dismiss the Declaration Movants' unsupported motion without prejudice to renewal before the special master was not an abuse of discretion. It was not unreasonable for the court to instruct the movants to resubmit their motion accompanied by evidentiary support or to ask a special master to determine the individualized, fact-specific issues the motion raised. As the Court of Appeals observed, the district court "simply drew on its inherent power to fashion an efficient and economic solution to the problem the movants presented." [Pet. App. 17a.] This decision is entirely correct — and presents no important issue of law requiring this Court's attention.

D. The Denial of the Motion for "Remedial Measures" Was Within the District Court's Sound Discretion.

On October 4, 1994, 11 weeks after the settlement hearing, the Coulters filed a motion alleging that two of MetLife's approximately 10,000 United States-based sales representatives had made allegedly improper contacts with several potential class members to discourage them from filing claims. Based on those two sales representatives' alleged statements, the Coulters conjured up a nationwide scheme by MetLife to "sabotage" the class notice, and they sought "injunctive relief" against further contacts with class members, "remedial measures" consisting of redoing the entire class notice and appointing the Coulters' attorney as co-counsel for the class, and "sanctions" requiring MetLife to pay the Coulters' attorneys' fees for the motion. [R. 9-188-1.]

The district court denied the motion because (*i*) the Coulters did not claim to have received any allegedly improper communications, and they lacked standing to assert the rights of any other class members, (*ii*) MetLife had taken proper steps to prevent its sales representatives from contacting potential class members about the settlement, and (*iii*) the Coulters had not shown any basis for concluding that MetLife had authorized the sales representatives' statements — which, in any event, were completely harmless. [App. 46a; R. 10-195-1, 10-206-1.] The

Court of Appeals affirmed on the ground that the Coulters themselves "were not affected by the alleged misconduct" and therefore lacked standing to seek relief. [Pet. App. 17a.] The court also held, in the alternative, that the district court had not abused its discretion in denying the requested relief because the Coulters had failed to establish that any alleged misconduct had occurred. [Pet. App. 17a-18a.]

As discussed above in connection with the Coulters' intervention motion, the Coulters have no right to assert claims on behalf of individuals other than themselves. To have standing, persons claiming relief

> must allege and show that they *personally* have been injured, not that injury has been suffered by other, unidentified members of the [alleged] class to which they belong and which they purport to represent. Unless [they] can thus demonstrate the requisite case or controversy between *themselves personally* and [the adverse party], none may seek relief on behalf of himself *or any other member of the class*.

Warth v. Seldin, 422 U.S. 490, 502 (1975) (emphasis added; quotation marks omitted). The Coulters therefore lacked standing to file the "remedial measures" motion.

In any event, the Coulters did not demonstrate any misconduct at all. The Coulters presented no evidence that MetLife encouraged or condoned the alleged contacts between its sales representatives and certain class members. Nor did they present any evidence to support their allegations that the two isolated incidents were part of a purported scheme to influence class members' decisions about whether to participate in the settlement. Indeed, there was nothing at all improper or misleading about the communications, one of which was made even before the proposed class action settlement had been reached.

. Granting the request for new class notice and appointment of the Coulters' attorney as co-counsel for the class would have

delayed the proceedings, increased MetLife's costs, and perhaps even upset the settlement. The district court therefore was entirely justified in concluding that the Coulters' motion was "filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney." [App. 46a.]

In these circumstances, the requested relief was unwarranted, and the district court did not abuse its discretion in denying the Coulters' motion based on the existing record. This fact-based decision does not turn on any important or unsettled issue of federal law justifying a writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 15, 1996

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STATUTORY AND OTHER PROVISIONS

Title 28, United States Code

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Federal Rules of Civil Procedure

Rule 6. Time

. . . .

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

. . . .

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

McCarran-Ferguson Act
15 U.S.C. §§ 1011-1015

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton

Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Effect on other laws

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. "State" defined

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

[Filed October 25, 1994.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. **CIV. NO. 93-1849-CIV-T-23A**

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER ON MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94). These motions were fully briefed (with accompanying affidavits); documents were submitted into the record; and the

Court held a hearing on the motions on July 18, 1994, at which presentations were heard from counsel for the would-be intervenors.

Based on these submissions, and the Court's Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object Filed by Certain Purported Class Members rendered herewith,

IT IS HEREBY ORDERED that:

1. The motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes is **DENIED**. The proposed complaint for declaratory judgment (Docket No. 65), proposed memorandum in opposition to class certification (Docket No. 66), proposed motion to modify protective order (Docket No. 67), and request to propound discovery (Docket No. 76), which were tendered with the former sales managers' motion to intervene, are **MOOT** in view of the Court's ruling on that motion to intervene.

2. The motion to intervene (Docket No. 77) by Ronald and Anissa Coulter is **DENIED**. The Coulters also filed a notice of intention to appear and object (Docket No. 119) on July 1, 1994. This objection is **UNTIMELY**. Pursuant to Court order, objections and supporting memoranda were due to be filed on or before June 13, 1994. (Docket No. 48, ¶ 10.) The Coulters' objection merely refers back to their motion to intervene and supporting memorandum. Nevertheless, as settlement class members, the Coulters were allowed to appear and object, and these matters were fully argued and considered at the July 18 hearing.

3. The motion to dismiss by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106), regarding the various notices of intention to appear and object to proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes), by Kevin J. Daxon and by Daniel Richard Urso, is **GRANTED**. Accordingly, the notice of

intention to appear and object filed by Daxon (Docket No. 89) is **DISMISSED** for lack of standing. The notice of intention to appear and object filed by Urso (Docket No. 94) is **DISMISSED** for lack of standing. The notice of intention to appear and object filed by the former sales managers (Docket No. 58) is **DISMISSED BY STIPULATION** that the former sales managers are not settlement class members.

4. Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III and John A. Ferrandes' motion for permission to examine the Court's appointed expert (Docket No. 100) is **DENIED AS MOOT**.

5. Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III and John A. Ferrandes' motion for leave to file a reply memorandum in support of their motion to intervene (Docket No. 90) is **GRANTED**. The Clerk is directed to file the memorandum attached to the motion.

6. Plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer's motion to supplement response to motion to intervene (Docket No. 108) is **GRANTED**. The Clerk is advised that the paper shall remain as filed.

7. Patrick Daxon's motion for permission to examine the Court's appointed expert (Docket No. 99) is **DENIED AS MOOT**.

8. Kevin J. Daxon's motion for permission to examine the Court's appointed expert (Docket No. 132) is **DENIED AS MOOT**.

9. Kevin J. Daxon's motion for leave to file a memorandum opposing plaintiffs' and MetLife's memoranda in support of the proposed settlement (Docket No. 124) is **DENIED AS MOOT AND UNTIMELY**.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94).

These motions were briefed, and affidavits were submitted. The Court heard oral argument at the July 18, 1994 hearing on the fairness of the proposed settlement.[1] Upon consideration of the papers submitted and arguments made, the Court denied the intervention motions and determined that Daxon and Urso do not have standing to object to the proposed set-

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1. The former sales managers moved for leave to file a reply brief in support of their motion to intervene, and they tendered a proposed reply brief with the motion. (Docket No. 90.) Leave to file a reply brief is granted; the reply brief has been considered by the Court. In addition, plaintiffs moved to supplement their response to the motion to intervene. (Docket No. 108.) This motion also is granted, as ordered below, and the supplemental material has been considered by the Court.

tlement.[2] In accordance with and in support of the determinations made at the hearing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Factual Background

1. Plaintiffs' central allegation in this case is that they and other members of the settlement class purchased whole life insurance policies issued by Metropolitan Life Insurance Company ("MetLife") as retirement and/or other savings plans or vehicles as a result of written or other sales solicitations that allegedly did not fully disclose that the product being sold was life insurance.

2. The complaint in this action was filed in November 1993 and was widely publicized in the press, particularly in the Tampa Bay area.

3. In April 1994, plaintiffs and MetLife agreed to a proposed settlement of this action and entered into a Settlement Agreement.

4. On April 22, 1994, this Court issued its Order with Respect to Class Certification, Notice, and Settlement Hearing (Docket No. 48), certifying a settlement class consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or

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2. At the July 18 hearing, counsel for the former sales managers (except Mr. Ferrandes) did not assert their clients' alleged standing to raise their previously filed objections. Instead, counsel spoke only on behalf of Daxon. After the Court's bench ruling on Daxon's lack of standing, however, the parties and the former sales managers stipulated on the record that the former sales managers were not settlement class members.

other solicitations that allegedly did not fully disclose that these plans were life insurance products, from

(a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or

(b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

5. The April 22 Order also approved forms of individual and publication notice and a proof of claim form. The proof of claim form required settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.)

Former Sales Managers, Urso and Daxon

6. At the time this action was filed, the former sales managers and Urso were employed by MetLife in Tampa, Florida. Their employment with MetLife later ceased.

7. Daxon has never been a MetLife employee, but he is the brother-in-law of former sales manager McCarron.

8. The former sales managers (except Ferrandes), Urso and Daxon all purchased MetLife whole life insurance policies

during the relevant time periods defined in the Settlement Agreement.

9. The former sales managers (except Ferrandes), Urso and Daxon did not contend they had been misled by the sales solicitations at issue in this case when they purchased their policies. To the contrary, the former sales managers admitted they "were not misled by anyone and knew perfectly well that they were buying whole life insurance." (Docket No. 58, at 11.) Daxon and Urso adopted the objections of the former sales managers (Docket Nos. 89 & 94) and thus make the same admission.

10. The former sales managers moved to intervene and sought leave to file a declaratory judgment complaint. They claimed to have an interest in this action because they allegedly had been accused by plaintiffs and MetLife of engaging in fraudulent and misleading sales practices and "are or may be personally liable for backcharges for commissions received on policies that are refunded under the class settlement." (Docket No. 64, at 4.) The former sales managers also sought to intervene to modify a Protective Order Regarding Confidentiality entered on April 1, 1994 (Docket No. 32), which covered material that MetLife voluntarily had disclosed to settlement class counsel during settlement negotiations.

11. Together with their intervention motion, the former sales managers also filed with the Court substantial discovery demands addressed to MetLife and plaintiffs, including Interrogatories and Requests for Production of Documents. (Docket No. 76.)

12. During the pendency of this action, the former sales managers filed suit against MetLife and others in the Thirteenth Judicial Circuit, Hillsborough County, Florida, Case No. 94-03445, making allegations similar to those they seek to assert by intervening in this action. (Docket No. 108.)

13. During the pendency of this action, Urso also filed suit against MetLife and others, alleging defamation and other claims, in the Thirteenth Judicial Circuit, Hillsborough County, Florida, Case No. 94-03752.

The Coulters

14. The Coulters are the named plaintiffs in an action originally filed on or about March 25, 1994, in the Court of Common Pleas of Allegheny County, Pennsylvania, but now pending after removal in the United States District Court for the Western District of Pennsylvania, Civil Action No. 94-0629. (Their complaint is attached as Exhibit 2 to Docket No. 77.)

15. The Coulters' Pennsylvania action asserts, *inter alia*, claims on behalf of a putative "subclass" of Pennsylvania residents who allegedly were solicited to purchase MetLife whole life insurance policies as savings and/or retirement plans. These allegations are substantially the same as those asserted by plaintiffs in this action.

16. The Coulters did not file a proposed complaint with their intervention motion, as required by Fed. R. Civ. P. 24(c). Instead, they sought to have "all Pennsylvania residents . . . severed [from this action] and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action" against MetLife. Alternatively, the Coulters asked "that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law." (Docket No. 77, at 1-2.)

17. The Coulters have not yet moved for class certification in Pennsylvania. Nor have they sought to have their attorney appointed as class counsel. MetLife has filed a motion to dismiss the Coulters' amended complaint, and that motion is pending before the federal district court in Pennsylvania.

18. As of June 8, 1994, approximately 800 Pennsylvania settlement class members had filed proofs of claim, even though the deadline for filing was not until June 30, 1994.

19. The Coulters asserted that, in January or February 1993, they purchased a MetLife whole life insurance policy that allegedly had been represented as a retirement or savings plan. (Pennsylvania Complaint ¶¶ 30-36.) They also claimed they purchased the insurance in part on the basis of sales solicitations that allegedly "failed to disclose that the solicitation was intended to propose insurance . . . ." (*Id.* ¶¶ 31-32.) These allegations place the Coulters, as individuals, within the settlement class certified by this Court.

Timing of Intervention Motions

20. Before the former sales managers and the Coulters filed their intervention motions on May 12 and 23, respectively, plaintiffs and MetLife had already entered into a settlement agreement, and this Court had preliminarily approved that agreement as sufficiently reasonable, adequate and fair to warrant notice to members of the settlement class. Following entry of the Court's April 22, 1994 Order granting preliminary approval, individual notice and claim forms were mailed to approximately 71,000 potential settlement class members, and notice was published in newspapers and magazines with a combined circulation in excess of 7 million. (Docket No. 144, 149.)

CONCLUSIONS OF LAW

Intervention as of Right

21. Absent an express statutory right to intervene (which the would-be intervenors do not assert), an applicant may not intervene as of right under Fed. R. Civ. P. 24(a)(2) unless:

> (1) the application to intervene is timely; (2) the applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to the suit.

ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (11th Cir. 1990).

22. An applicant must meet all four criteria to intervene under Rule 24(a)(2). *Id.*; *accord Washington Elec. Coop., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96 (2d Cir. 1990). The Court has considered each of the four factors as follows.

The Former Sales Managers

23. ***Interest***: Rule 24(a)(2)'s "interest" criterion requires that a would-be intervenor "possess a direct, substantial, legally protectable interest in the proceeding and . . . be at least a real party in interest in the transaction which is the subject of the proceeding." *ManaSota-88, Inc.*, 896 F.2d at 1321 (quotations omitted); *accord United States v. South Fla. Water Mgmt. Dist.*, 922 F.2d 704, 707 (11th Cir.), *cert. denied*, 112 S. Ct. 407 (1991). The purported interest also must be "relat[ed] to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2).

24. The Court concludes that the two alleged interests the former sales managers purportedly seek to protect — avoiding "backcharges" and preserving their reputations against allegations they say indirectly reflect on them — are not "relat[ed] to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a)(2). The claims in this case concern transactions between MetLife and members of the settlement class arising from sales solicitations that allegedly did not fully disclose that the product being sold was life insurance. This case does not concern the former sales managers' and MetLife's relationships *inter se*; nor is it about the former sales managers' reputations.

25. The former sales managers' introduction of irrelevant allegations involving their compensation arrangements with MetLife, their personal reputations and other matters would raise numerous complicated factual and legal questions that have not been, and need not be, addressed or resolved in this action.

Plaintiffs' "complaint define[s] the general scope of the action and [movants] cannot now by intervention radically alter that scope to create a much different suit." *Washington Elec. Coop., Inc.*, 922 F.2d at 97 (denying intervention where movant would raise new issues); *accord Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 638, 640 (1st Cir. 1989); *Morgan v. Sears, Roebuck & Co.*, 124 F.R.D. 231, 233 (N.D. Ga. 1988).

26. Similarly, this action does not implicate the former sales managers' alleged interest in protecting their professional reputations. If the former sales managers believe they were defamed, and if such alleged defamation is legally cognizable, they may seek to pursue such claims at another time and in another proceeding — as they in fact have done. *See New York News, Inc. v. Newspaper & Mail Deliverers' Union*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991) (denying nonparty's motion to intervene to seek Rule 11 sanctions for allegedly defamatory statements, and holding that appropriate remedy was defamation action, not intervention), *aff'd sub nom. New York News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992).

27. The former sales managers' alleged interest in preventing the purported "solicitation" of "defamatory statements" in the proof of claim forms sent to potential settlement class members also provides no basis for intervention. The claim forms, which this Court previously approved, do not solicit defamatory statements about the former sales managers or presuppose the existence of misrepresentations by them or by anyone else. They ask only *whether* the policyholders received the type of sales solicitation at issue and *whether* the policyholders were misled as a result.

28. The former sales managers' suggestion that the forms will encourage settlement class members to fabricate alleged misrepresentations is baseless. Settlement class members who seek to make a claim not only must sign the claim form but also must swear to the accuracy of their responses before a notary or other competent officer. These claim procedures cannot

reasonably be said to solicit false or defamatory statements. Moreover, settlement class members' statements on claim forms are absolutely privileged and not defamatory. *See Fridovich v. Fridovich*, 598 So. 2d 65, 66 (Fla. 1992).

29. Not only are the former sales managers' alleged "interests" unrelated to and unaffected by this case; they also are too hypothetical to be cognizable under Rule 24(a)(2). The former sales managers admit that their alleged liability for "backcharges" is merely "potential." (Docket No. 65, Proposed Intervention Complaint ¶ 20.) An interest that is "purely a matter of speculation" because it is contingent on some possible future action or event cannot support intervention under Rule 24. *ManaSota-88, Inc.*, 896 F.2d at 1322; *accord Travelers Indem. Co.*, 884 F.2d at 638; *Washington Elec. Coop., Inc.*, 922 F.2d at 97; *Arizona v. Motorola, Inc.*, 139 F.R.D. 141, 146 (D. Ariz. 1991).

30. The former sales managers' claimed interest in their reputations also is too hypothetical to support intervention. Settlement class members have not been asked to make defamatory statements about the former sales managers in the proofs of claim, and there is no basis for expecting them to do so.

31. ***Impairment of Interest***: Even if the former sales managers' alleged interests in avoiding "backcharges" and protecting their reputations were cognizable and sufficiently related to this case, the Court would conclude that "the disposition of the action [would not] impede or impair [their] ability to protect [those] interest[s]." Fed. R. Civ. P. 24(a)(2). The former sales managers, in fact, already have filed a state court action raising issues relating to their alleged interests.

32. Neither the settlement of this action nor its litigation would determine whether the former sales managers were defamed or whether they can be "backcharged." Because none of the former sales managers' purported "interests" would be adjudicated, the former sales managers' ability to protect those

"interests" would not be impaired by a denial of intervention. *See, e.g., Morgan*, 124 F.R.D. at 233 (denying clothing manufacturer's motion to intervene in products liability action that would not determine whether it had made allegedly defective product).

33. Moreover, the former sales managers would not be bound by the disposition of the claims before this Court because they do not assert such claims, are not parties to the action (or settlement) and are not in privity with any party. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 761-62 (1989) (nonparties not bound by consent decree); *South Fla. Water Mgmt. Dist.*, 922 F.2d at 709 (without intervention, nonparty cannot be bound). Nor would the former sales managers be bound as settlement class members because, as stipulated, they are not members of the settlement class. *See, e.g., In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 343 (N.D. Ga. 1993) (nonmember of class cannot be bound and lacks standing to object to settlement).

34. Where, as here, a would-be intervenor will not be bound by disposition of the main action and can adequately protect his alleged "interest" in an independent suit, intervention as of right should be denied. *E.g., Worlds v. Department of Health & Rehab. Servs.*, 929 F.2d 591, 594-95 (11th Cir. 1991) (denying intervention where applicants had filed separate suit); *United States v. Automobile Mfrs. Ass'n*, 307 F. Supp. 617, 621 (C.D. Cal. 1969) (denying intervention because consent decree did not affect "the rights of the [applicants] to prosecute their own claims"), *appeal dismissed*, 397 U.S. 248 (1970); *see also ManaSota-88, Inc.*, 896 F.2d at 1323.

35. ***Adequacy of Representation***: The Court concludes that the third Rule 24(a)(2) factor — whether the existing parties will adequately represent the movants' interests — also cannot justify the former sales managers' intervention. Implicit in this requirement is the assumption that the former sales managers actually have a cognizable interest capable of being impaired or impeded by this action. As discussed above, however, the former

sales managers' own claims against and relationship with MetLife are not at issue in this case. Whether the former sales managers' alleged interests are adequately represented thus is irrelevant at this time. Moreover, to the extent the former sales managers allegedly have any direct interests as against third parties, those interests are the same as MetLife's: the former sales managers and MetLife can both be expected to seek to restrict settlement class relief to those persons who are eligible to receive it. These interests thus are adequately represented by MetLife, even if the former sales managers and MetLife might have different litigation strategies and different motives. *See, e.g., Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 205 (7th Cir. 1982) (representation adequate because "existence of an adversary relationship between the company and the [movants] with respect to [movants'] share of the profits is surely no deterrent to the maximization of the profits"); *see also Washington Elec. Coop., Inc.*, 922 F.2d at 98; *Pierson v. United States*, 71 F.R.D. 75, 80 (D. Del. 1976).

36. ***Timeliness***: This Court must consider four factors in assessing an intervention motion's timeliness:

> (1) the length of time during which the intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case; (3) the extent of the prejudice that the would be intervenor may suffer if his petition for leave to intervene is denied; [and] (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Reeves v. Wilkes, 754 F.2d 965, 968-69 (11th Cir. 1985); *accord United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th

Cir. 1983). The Court concludes that the former sales managers' intervention motion is untimely under each of these four factors.

37. First, substantial delay occurred between the time the former sales managers knew or should have known of their alleged interest in this case and the time they moved to intervene. The former sales managers were still employed by MetLife in Tampa when this action was filed -- with considerable attendant publicity in the national and regional press — in November 1993. The Court therefore concludes that the former sales managers either actually knew or certainly should have known about this case and the requested relief at least six months before they moved to intervene. Their decision to defer attempted intervention until after the parties had executed the Settlement Agreement, obtained preliminary approval from this Court and sent notice to the settlement class suggests unexcusable delay and is sufficient reason to deny intervention. *See, e.g., Reeves*, 754 F.2d at 969-70 (where suit against would-be intervenors' employer was publicized in local newspapers, they should have known of its pendency and should have moved to intervene sooner); *Jefferson County*, 720 F.2d at 1516 (intervention denied where movants "knew at an early stage in the proceedings that their rights could be adversely affected"); *see also United States by Bell v. Allegheny-Ludlum Indus., Inc.*, 553 F.2d 451, 453 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). The former sales managers' argument that they could not have known of their alleged interest in these proceedings until their employment with MetLife ceased in the spring of 1994 is baseless for at least two reasons: (*i*) plaintiffs' November 1993 complaint itself sought restitution and rescission of the insurance policies that the former sales managers now claim might lead to "backcharges," and (*ii*) the lawsuit and complaint received extensive publicity in Tampa and elsewhere.

38. Second, allowing the former sales managers to intervene at this late date would cause substantial and unwarranted prejudice to the existing parties. The former sales

managers did not file their motion until after the parties had devoted much time, effort and expense to (*i*) negotiating a settlement agreement, (*ii*) obtaining this Court's preliminary approval of the settlement proposal, (*iii*) mailing individual notice of the proposed settlement to some 71,000 potential settlement class members, (*iv*) publishing additional notice in newspapers and magazines throughout the country, and (*v*) retaining a professional claims administrator to answer potential settlement class members' questions and process thousands of proofs of claim. Allowing the former sales managers to intervene at this relatively late date would inject many new and unrelated questions into the case and would delay and disrupt the pending settlement proceedings, which await only final Court approval. This delay would severely prejudice the parties' interests in implementing the relief outlined in the Settlement Agreement and in providing a prompt, efficient and equitable resolution without the attendant costs, risks and burdens of further litigation. *See, e.g., Campbell v. Hall-Mark Elec. Corp.*, 808 F.2d 775, 779 (11th Cir. 1987) (denying application because intervention "would significantly prejudice the existing parties, primarily because of the delay to the plan participants . . . who have elected to take the settlement offer"); *Reeves*, 754 F.2d at 971 (denying motion because, "if intervention is allowed, time and effort expended in formulating the settlement . . . will be for naught"); *Jefferson County*, 720 F.2d at 1517 (denying motion because untimely intervention "would plainly have prejudiced the existing parties, since it would have nullified [their] negotiations").

39. Third, denial of intervention would not prejudice the former sales managers because (*i*) they have no interest in the substance of this action, (*ii*) they will not be bound by its outcome and (*iii*) they may raise their claims in their state court action, which already asserts essentially the same allegations the former sales managers seek to raise here. *See, e.g., Campbell*, 808 F.2d at 779 (no prejudice where applicant "may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important"); *Reeves*, 754 F.2d at 971 (no

prejudice where applicants "could alternatively institute an independent lawsuit and assert the specific violations of their rights"); *Jefferson County*, 720 F.2d at 1517-19 (no prejudice where movants could institute independent suit and would not be bound by outcome of action in which they sought to intervene).

40. Fourth, other unusual circumstances here also disfavor intervention as untimely. The former sales managers have claimed that, if (and only if) they are allowed to intervene, a conflict of interest would arise that would disqualify some or all of the law firms representing the parties. An attempt to disqualify counsel at this late stage of the case would cause substantial delay and prejudice to the parties. In addition, the former sales managers have sought to take extensive discovery from MetLife and the settlement class representatives in connection with their intervention motion. This discovery also would cause substantial and unjustifiable delay and prejudice to the parties and the Court.

41. The former sales managers therefore have not satisfied any of Rule 24(a)(2)'s four requirements for intervention as of right.

The Coulters

42. The Court next considers the four Rule 24(a)(2) requirements in connection with the Coulters' motion to intervene.

43. ***Interest and Impairment of Interest***: Because the Coulters are settlement class members, they have a legally protectable interest in the subject of this action. This Court's April 22, 1994 Order, however, allowed the Coulters — and any other dissatisfied Pennsylvania residents within the settlement class — to opt out of the settlement class and litigate elsewhere if they chose to do so. Thus, the Coulters and other Pennsylvania residents cannot claim that the disposition of this action would unduly impede or impair their interests if intervention were denied. *See, e.g., Roberts v. Heim*, [1989] Fed. Sec. L. Rep.

(CCH) ¶ 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same).

44. In the alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. *See* Fed. R. Civ. P. 23(c)(2)(c). The Coulters appeared through their own attorney at the fairness hearing.

45. As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights. *See, e.g., Webcor Elec. Inc. v. Whiting*, 101 F.R.D. 461, 466 (D. Del. 1984) (denying intervention to shareholders because they could object at fairness hearing); *Officers for Justice v. Civil Serv. Comm'n*, 473 F. Supp. 801, 829-30 (N.D. Cal. 1979) (denying intervention to class members who had opportunity to object at fairness hearing), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 289, 295 (N.D. Cal. 1976), *aff'd sub nom. Alaniz v. Tillie Louis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978).

46. ***Adequacy of Representation***: The Court also rejects the Coulters' argument that plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles.

47. Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in

this action and that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation are not satisfied as to the putative subclass they allege. These contentions ignore that the parties have presented the Court with a *settlement* and that Rule 23's requirements "may be more easily satisfied in the settlement context than in the more complex litigation context." *Dalkon Shield Claimants Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.)*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *see also Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-58 (S.D. Ohio 1992).

48. ***Timeliness:*** The Court questions whether the Coulters' intervention motion is timely under the factors articulated in *Reeves*, 754 F.2d at 968-69. The Coulters filed their Pennsylvania action on or about March 25, 1994; they therefore knew of their claims before that date. Moreover, in light of the extensive national publicity that this case and MetLife's sales solicitations received, the Coulters quite likely knew or should have known about this action when they filed their Pennsylvania suit. Yet the Coulters did not move to intervene here until May 23 — well after the Court had preliminarily approved the proposed settlement and individual notice had been mailed to potential settlement class.

49. The Court need not decide, however, whether the Coulters' intervention motion was timely because the motion fails to satisfy two of the other four Rule 24(a)(2) requirements: impairment of interest and inadequacy of representation. As discussed above, a prospective intervenor must meet *all four* of those requirements to intervene as of right. *ManaSota-88, Inc.*, 896 F.2d at 1321; *accord Washington Elec. Coop., Inc.*, 922 F.2d at 96. In addition, denial of intervention would in no way prejudice the Coulters because (*i*) they had an opportunity to exclude themselves from the settlement class or object to the proposed settlement and (*ii*) they actually entered an appearance in this case.

50. The Court therefore concludes that the Coulters cannot intervene as of right because they have not met Rule 24(a)(2)'s requirements. Moreover, their motion is defective for several other reasons.

51. ***Asserted Right to Represent Other Pennsylvania Residents:*** The Coulters' attempt to exclude all Pennsylvania residents from the settlement class is improper. Just as the Coulters had the right to participate in or opt out of the settlement class, so did every other settlement class member who resides in Pennsylvania. The Coulters have no authority unilaterally to make that decision for all other Pennsylvania settlement class members. *See* 3 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 16.16 at 16-90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an *individual decision* of each class member and may not be usurped by the class representative or class counsel") (emphasis added). The type of group or mass opt-out that the Coulters seek therefore is improper — especially where so many Pennsylvania residents already have filed claim forms expressing their desire to participate in the proposed settlement. *See, e.g., Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on an individual basis, and noting that "a mass opting out . . . clearly would be disruptive to the district court's ongoing settlement management").

52. The Coulters' attempt to "sever" or exclude all Pennsylvania residents from the settlement class also is particularly inappropriate because the Coulters have not been determined to be adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege or to force the putative subclass members' withdrawal from the settlement class certified in this action.

53. ***Due Process*:** The Coulters' claim that this Court's application of Florida law to Pennsylvania residents would violate due process is unfounded. The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement — an issue controlled by *federal* law governing settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles. In addition, if the Coulters and other Pennsylvania residents believed that Pennsylvania law gave them a greater potential recovery than would be available to other settlement class members, they could have excluded themselves from the settlement class.

54. ***Procedural Defect*:** Intervention also is denied because the Coulters did not attach a pleading as required by Rule 24(c) "setting forth the claim or defense for which intervention is sought." The failure to attach a pleading is especially significant here because the Coulters do not even attempt to assert a claim or defense; rather, they seek to intervene so they can "sever" themselves and all other Pennsylvania residents from the case.

Permissive Intervention

55. Where an applicant may not intervene as of right under Rule 24(a)(2), the Court nevertheless has discretion to permit intervention under Rule 24(b)(2) if the application is timely *and* if

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2); *see, e.g.*, *ManaSota-88, Inc.*, 896 F.2d at 1323.

56. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." *Worlds*, 929 F.2d at 595 (quotations omitted).

The Former Sales Managers

57. As discussed above, the Court concludes that the former sales managers' application is untimely and prejudicial. This reason alone justifies denying intervention under Rule 24(b)(2) as well as Rule 24(a)(2).

58. In addition, the former sales managers cannot meet the other Rule 24(b)(2) criteria, and the numerous collateral issues and attendant delay that would result from their intervention also militate against granting the motion.

59. The former sales managers' "claims and defenses" have nothing in common with the issue presently before the Court: the fairness of the settlement. In fact, the only claims the former sales managers have asserted are entirely *different* from those averred in plaintiffs' complaint; they are irrelevant and hypothetical at best. Nor have the former sales managers raised any defenses, because no one has asserted any claims against them.

60. Even if the former sales managers could satisfy the other requirements for permissive intervention, the Court nevertheless would exercise its discretion to reject their efforts to introduce wholly irrelevant issues into this proceeding and delay timely implementation of the settlement. Courts routinely refuse to permit intervention where, as here, an applicant "seeks to inject numerous issues into the case." *ManaSota-88, Inc.*, 896 F.2d at 1323; *accord Washington Elec. Coop., Inc.*, 922 F.2d at 98 ("The potential for delay and the complication engendered by the injection of [new] issues justify denial of the motion").

61. Particularly in light of "the strong judicial policy favoring settlement," *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984), this Court will not allow collateral and irrelevant issues to delay or jeopardize the proposed settlement. *See, e.g., Farmland Dairies v. Commissioner of N.Y. State Dep't of Agriculture & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988) (denying intervention because, "if [movants] were permitted to intervene at this late date, there is no question that the settlement concluded by [the original parties] would be jeopardized"); *Motorola, Inc.*, 139 F.R.D. at 147; *Automobile Mfrs. Ass'n*, 307 F. Supp. at 620.

62. The former sales managers also threaten to try to disqualify some or all of the attorneys representing the parties based on alleged conflicts of interest that would arise only if intervention were permitted. This is yet another a reason to deny intervention. *See Davis v. Southern Bell Tel. & Tel. Co.*, 149 F.R.D. 666, 672 (S.D. Fla. 1993) (intervention denied because it would create conflict of interest warranting disqualification of certain counsel).

63. Similarly, the former sales managers have requested discovery that would substantially delay the resolution of this action. The Court denies intervention for this reason as well. *See, e.g., H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (denying intervention because discovery by movant would cause undue delay); *Morgan*, 124 F.R.D. at 233.

The Coulters

64. As discussed above, the Coulters' intervention motion might be untimely. But more importantly, the procedures adopted by the Court for potential class members to object or exclude themselves from the settlement class already offer the Coulters all the relief they seek for themselves and other Pennsylvania settlement class members. Granting permissive intervention thus would serve no purpose where the would-be

intervenors wish only to "sever" themselves from the action and already have the right to do so. (As discussed above, however, the Coulters' unilateral attempt to "sever" other Pennsylvania settlement class members is improper.)

Standing to Object to Proposed Settlement

65. Urso and Daxon seek to assert a number of objections to the class settlement and the class notice. They lack standing to raise these objections because they are not members of the settlement class and do not assert claims covered by the Settlement. *See, e.g., Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989) ("non-class members have no standing to object, pursuant to a Rule 23(e) notice directed to class members, to a proposed class settlement"), *cert. denied*, 493 U.S. 1058 (1990); *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 172 (5th Cir. 1979) (only class members may object to settlement), *cert. denied*, 452 U.S. 905 (1981); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 342-43; *In re Sunrise Sec. Litig.*, 131 F.R.D. 450, 459 (E.D. Pa. 1990); *Mashburn v. National Healthcare, Inc.*, 684 F. Supp. 660, 673 (M.D. Ala. 1988).

66. The settlement class certified by this Court includes only those persons who meet all portions of the class definition, including the requirement that they purchased their MetLife whole life insurance policy "as a retirement and/or other savings plan or vehicle, *based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products.*" (Docket No. 48, ¶ 1; emphasis added.) In addition, settlement class members who seek to make a claim must certify on the claim form that they had been misled when they bought their whole life policies.

67. Daxon expressly adopted the former sales managers' objections and, thus, the admission that he "knew perfectly well that [he was] buying whole life insurance." (Docket No. 58, at 11.) On the day of the hearing, his counsel tendered an addi-

tional affidavit, sworn to by Daxon on July 13, 1994, but it does not recant this admission or allege that Daxon was misled.

68. Daxon also has proffered a memorandum to the Court in which he attempts to assert certain additional objections about the adequacy of the notice. (Docket No. 124.) Although Daxon's objections about the notice were not timely made before the June 13, 1994 deadline (even if Daxon had standing to object in the first place), the Court has considered his memorandum.

69. Urso purchased his policy based on his own knowledge of the product involved, not as a result of the alleged sales solicitations that are the subject of this case. Urso also expressly adopted the former sales managers' objections and, thus, the admission that he "knew perfectly well that [he was] buying whole life insurance." (Docket No. 58, at 11.)

70. Urso's principal basis for objecting to the proposed settlement appears to be his contention that "MetLife is attempting to purchase . . . evidence that it can use against Mr. Urso" in the lawsuit he has brought against MetLife. (Docket No. 139, at 3.) Urso presents no evidence to support this assertion.

71. Neither Daxon nor Urso is a settlement class member, and neither asserts claims on behalf of the settlement class. Daxon and Urso therefore have no standing to object to the disposition of those claims as contemplated by the Settlement Agreement. The Court has nevertheless considered their written submissions and heard extensive argument on the objections they wished to make at the July 18 hearing. The Court's findings and conclusions on the objections they assert will be set forth in the Court's separate ruling on the fairness of the proposed settlement.

In Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

The following class members filed requests for enlargement of time within which to seek exclusion from the class ("requests"): John Romano (Doc. 119B), Terrance J. McDonnell (Doc. 119C), Joann Kablach (Doc. 119D), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), Deborah R. Myers (Doc. Doc. 159), Darrin L. Johns (Doc. 160), Anissa and Ronald Coulter (Doc. 174), Jeanne Yokel (Doc. 175), Eric Maharg (Doc. 176), and Albert Darren Wise (Doc. 177) (collectively, the "applicants").

Each of the requests were filed by attorney Kenneth Behrend. The applicants seek to exclude themselves from the class even though they failed to comply with the provisions of the settlement agreement (Doc. 35) and applicable order (Doc. 48). Both the agreement and order require that class members electing exclusion send to the Claims Administrator a "request for exclusion" postmarked on or before June 13, 1994.

None of the applicants questions the need for a deadline or the appropriateness of the June 13, 1994, deadline. The applicants suggest simply that they should be provided additional time to exclude themselves because they have shown "excusable neglect" under Rule 6(b)(2), Federal Rules of Civil Procedure. The excusable neglect standard applies to the requests because they were filed after the expiration of time for seeking exclusion.

The determination of whether the time for exclusion should be enlarged is left to the district court's sound discretion. *See, e.g., Davidson v. Keenan*, 740 F.2d 129 (2d Cir. 1984). "To sustain a finding of excusable neglect, the party seeking the enlargement of time bears the burden of proving both *good faith* and a *reasonable basis* for not complying within the specified period." *Breslow v. Prudential-Bache Props., Inc.*, 1994 WL

478611, *3 (N.D. Ill. Sept. 1, 1994) (emphasis added). The class action deadline serves an important function and should not be disturbed casually. *Id.* For the following reasons, the applicants' requests are **DENIED**.[1]

Before addressing the individual requests, considering the prejudice, if any, the respective parties may suffer by denying the requested relief is worthwhile. In its response (Doc. 190), Metlife offers the applicants the same settlement options that were available initially to them even though the time for submitting a completed proof of claim form has passed.[2] In a separate order, the terms of the settlement agreement, including the cash refund and annuity options, are held fair, reasonable, adequate, and in the best interest of the class members. Therefore, precluding the applicants from opting out of the class at this time will cause

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1. This ruling is based on the merits. In its response (Doc. 190), Metlife seeks denial of the requests based, in part, on procedural grounds. Metlife asserts that the "requests" are fatally defective because they are not styled as "motions." Without citing to any case authority, Metlife suggests that, to give effect to the difference between Rule 6(b)(1), which allows an enlargement of time based simply on a request, and Rule 6(b)(2), which requires a motion, the applicants' papers must be styled as motions. Here, the difference is inconsequential. The parties have been provided an opportunity to respond to the requests regardless of how they are designated. Accordingly, Metlife's procedural argument is unavailing. For purposes of this order, the applicants' requests are construed as motions and denied on the merits. A procedural basis for denying the requests is the applicants' failure to comply with Local Rule 3.01(g). However, in light of Metlife's response (Doc. 190), requiring the parties to confer in good faith appears futile. For this reason, the requests are considered despite the applicants' non-compliance with the Local Rules.

2. Metlife is now bound to offer the applicants the option of either the cash refund or the annuity. Upon entry of this order, the applicants may contact counsel for Metlife to discuss submitting a completed claim form and electing one of the options.

them no cognizable prejudice. In fact, many of the applicants request a cash refund as alternative relief.

On the other hand, allowing class exclusions at this late stage will cause severe prejudice to Metlife. The settlement agreement reflects the parties bargained-for expectations. The opt-out deadline is a material provision of the settlement agreement. That deadline provided Metlife with an opportunity to determine the potential number of claims that may remain unresolved and to evaluate the objections to the proposed settlement. Prior to the fairness hearing, Metlife had the ability to assess that information and, pursuant to the terms of the settlement agreement, to terminate the proposed settlement. Metlife no longer has the right to consider the applicants' claims and decide whether to terminate the agreement.

From Metlife's perspective, a bargained-for purpose of the $76 million agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Allowing untimely exclusions without sufficient cause and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

The first group of applicants to be considered are those class members who allege that they failed to submit their requests for exclusion on or before June 13, 1994, because the proof of claim form is allegedly confusing. Their argument is without merit. The class notice, which accompanied the claim form and was approved by this Court, states clearly that a class member, to be excluded from the class, must submit to the Claims Administrator a request for exclusion postmarked on or before June 13, 1994. The claim form, which is equally clear, addresses the procedure for electing the cash refund and annuity options, and not the procedure for opting-out.

As a matter of law, misunderstanding the language of a court-approved class notice and claim form fails to constitute excusable neglect for purposes of Rule 6(b)(2). *See In re VMS Secs. Litig.*, 1992 WL 203832, *3-4 (N.D. Ill. Aug. 13, 1992). If class members needed additional information, they could have contacted class counsel or the Claims Administrator. The class notice specifically informed the class members that those resources were available for free. Alternatively, class members who were unable to understand the class notice or claim form could have consulted with their attorney. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51-2 (7th Cir. 1994).

Accordingly, the requests for enlargement filed by class members Terrance J. McDonnell (Doc. 119C), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), and Albert Darren Wise (Doc. 177) fail to establish excusable neglect and are denied. Except for Wise, each of these applicants requests the cash refund as alternative relief. Inasmuch as Metlife must offer either the cash refund or the annuity, the applicants will be receiving, in part, their requested relief.

Class members Deborah R. Myers and Darrin L. Johns filed their requests for enlargement (Docs. 159 and 160, respectively) on August 8, 1994. In their requests, both Myers and Johns assert that they met with their attorney, Kenneth Behrend, well before the June 13, 1994, deadline and expressed to him their desire to be excluded from the class. Due to some undefined "clerical error," their attorney did not submit requests for exclusion to the Claims Administrator.

The requests for enlargement filed by Myers and Johns fail to establish excusable neglect. Their assertions are not supported by an affidavit or some other admissible evidence. Additionally, assuming the assertions are true, inadvertence of counsel generally fails to constitute excusable neglect. *See, e.g., Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984); *Jones v.*

Siegfried Constr. Co., Inc., 105 F.R.D. 491, 492 (W.D.N.Y. 1984), *aff'd*, 792 F.2d 136 (2d Cir.), *cert. den. sub nom. Jones v. Niagara Frontier Transp. Auth.*, 479 U.S. 932, 107 S. Ct. 404 (1986). Myers and John explain neither the alleged "clerical error" nor the eight-week period that lapsed before attempting to correct the error. Accordingly, the requests for enlargement filed by Myers (Doc. 159) and Johns (Doc. 160) are denied.

Joann Kablach's request (Doc. 119D) fails to show excusable neglect. Kablach avers that she was unable to submit a timely request for exclusion because she did not receive a class notice and claim form packet until June 17, 1994. However, Kablach fails to mention that she did not request a packet until June 16, 1994. *See* ¶ 6(c) of Goldsmith Affidavit (Doc. 191). Conspicuously missing from Kablach's request is the date she met with her attorney and learned about the June 13, 1994, deadline. For these reasons, Kablach's request (Doc. 119D) is denied.

In his unverified request (Doc. 176), Eric Maharg states that he failed to submit a timely request for exclusion because he reasonably relied (1) on a form letter and pamphlet that he received from his Metlife sales agent and (2) on alleged representations made by his Metlife sales agent in relation to the pamphlet.

The form letter, dated March 31, 1994, discussed simply the availability of "up-to-date" information regarding Maharg's policy (*e.g.*, current cash value). The pamphlet prepared my Metlife advises policyholders that the controversy over sales practices would not affect the financial security of the company's products. The pamphlet also discusses Metlife's response to investigations by state regulators and the company's financial strength. The purported representation made by Metlife's sales agent allegedly includes assurances that Maharg's policy is unrelated to the policies sold in Florida and suggests that he refrain from taking action in the Florida proceeding.

Maharg's claim of reasonable reliance is without merit.[3] Reliance on a defendant's account agent (for purposes pertinent to this case) is unreasonable and fails to constitute excusable neglect. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 52 (7th Cir. 1994). Moreover, neither the March 31 letter, the accompanying pamphlet, nor the ensuing conversation with the Metlife sales agent could have possibly suggested to Maharg that he ignore the June 13, 1994, deadline to exclude himself from the class. The parties did not enter the settlement agreement until April 6, 1994. More important, the settlement class was not certified and the June 13, 1994, deadline was not established until April 22, 1994. Further, nothing in the March 31 letter or pamphlet even remotely suggests that Maharg refrain from excluding himself from this class action lawsuit.

Assuming that the Metlife sales agent suggested to Maharg that he refrain from participating in the Florida proceedings described in the pamphlet, that suggestion is of no consequence. The proceedings described in the pamphlet are a regulatory investigation conducted by the Florida Insurance Department, an in-house investigation conducted by Metlife, internal changes made by Metlife as a result of its in-house investigation, and a program implemented voluntarily by Metlife to provide restitution to policyholders who purchased whole life insurance from the Tampa office. Maharg could not have participated in these proceedings. The Metlife sales agent has no recollection of telling Maharg or any other policyholder that they should refrain from participating in this class action lawsuit. *See* Affidavit of Mathew A. Badger (Doc. 203).

Finally, Maharg purportedly learned about the June 13, 1994, deadline in August when he consulted with attorney Kenneth Behrend. If Maharg could consult with an attorney in

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3. Because Maharg fails to show reasonable reliance, the remaining two elements of equitable estoppel (*i.e.*, misrepresentation, detrimental reliance) need not be considered.

August, he could have consulted with an attorney before the June 13 deadline. Maharg should have consulted a competent, independent professional with his legal questions. He should not have relied (assuming he did) on his Metlife sales agent, the person with whom he allegedly had a dispute.

Maharg has not and cannot assert that he was unaware of this class action and the settlement options. The Claims Administrator sent Maharg a class notice. *See* Affidavit of G. Peter Buchband (Doc. 202); Affidavit of Lawrence A. Vranka (Doc. 201). Whether Maharg actually received the notice is irrelevant so long as Metlife complied with the court-approved notice procedures. *See In re VMS Secs. Litig.*, 1994 WL 386397, *3 (N.D. Ill. July 20, 1994). Even if Maharg's unsworn statement that he never received the class notice is true, he was on constructive notice of the pending class action and proposed settlement pursuant to the published notice contained in newspapers circulated throughout Pennsylvania. For these reasons, Eric Maharg's request for enlargement of time within which to exclude himself from the class (Doc. 174) is denied.

John Romano's request (Doc. 119B) is denied as well. Romano states that his attorney, Kenneth Behrend, posted his request for exclusion on June 13, 1994, but that it was not postmarked until June 14, 1994. However, according to a sworn admission made on Romano's behalf, this statement is untrue. On June 13, 1994, Mr. Behrend attempted to exclude Mary Romano and not John Romano. *See* Affidavit of Lorrie Wesolosky (Doc. 119A). The Claims Administrator never received a request for exclusion from John Romano. The Claims Administrator did receive from Mary Romano a request postmarked on June 14, 1994. *See* ¶ 4(b) of Affidavit of Linda Goldsmith (Doc. 191). Accordingly, because John Romano never submitted a request for exclusion as he suggests, his request for enlargement (Doc. 119B) is denied. Mary Romano, who made an unsuccessful attempt to exclude herself, has not sought any relief.

Anissa and Ronald Coulter request an enlargement of time within which to exclude themselves from the class (Doc. 174). On March 24, 1994, the Coulters filed in Pennsylvania their own lawsuit against Metlife. The Coulters do not suggest excusable neglect as a basis for seeking permission to submit an untimely exclusion. Instead, they argue that they should be excluded from the class because they manifested their intent to be excluded when they (1) filed their Pennsylvania action on March 24, 1994, and (2) filed their motion for intervention (Doc. 77) in this action on May 23, 1994. To the extent that the Coulters suggest excusable neglect, they assert that they should be relieved from the June 13, 1994, deadline because they never received a class notice.

As Metlife states in its response, "Of all the positions taken by the various applicants, the least explicable is that of Ronald and Anissa Coulter." *See* p. 14 of Metlife response (Doc. 206). In their motion for intervention (Doc. 77), the Coulters sought to exclude all Pennsylvania residents from this action or to have their attorney appointed as counsel for the Pennsylvania members of the settlement class. As class members, the Coulters also filed a notice of intention to appear and objections to the proposed settlement (Doc. 119).

"The pendency of an individual action does not excuse a class member from filing a valid request for exclusion." *In re VMS Secs. Litig.*, 1992 WL 203832, *3 (N.D. Ill. August 13, 1992). Apparently, the Coulters made a tactical decision to avoid exclusion for the purpose of objecting to the settlement and seeking significant relief (*i.e.*, exclusion of all Pennsylvania residents or appointment of their attorney as class counsel).[4]

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4. Unlike some of the other applicants, the Coulters do not deny the tactical nature of their decision. For example, in Maharg's request (Doc. 176), he states, "The decision to request exclusion at this time was not made in bad faith, i.e., to obtain any tactical advantage in the class action proceedings."

However, they cannot have it both ways. The Coulters had a choice to opt out or participate. They chose to participate. The parties were forced to respond to the numerous papers that the Coulters filed in this action. A tactical decision in litigation does not constitute excusable neglect. *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 (5th Cir. 1990). The Coulters will not be relieved from the consequence of their failed plan. They received the benefits of retaining their class membership (*i.e.*, objecting to the settlement and participating in the fairness hearing) and must now accept the settlement. *See, e.g., In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51 (7th Cir. 1994).

The Coulters' assertion that they should be relieved from the June 13, 1994, deadline because they did not receive the notice is baseless. The Claims Administrator mailed a class notice to Ronald Coulter on May 2, 1994. *See* Affidavit of G. Peter Buchband (Doc. 202). Moreover, based on the Coulters' papers, they knew about the proposed settlement and became intimately familiar with its terms as early as May 5, 1994. *See* ¶ 16 of the Coulters' motion to intervene (Doc. 77). Because the Coulters knew about the June 13, 1994, deadline and had the ability to exclude themselves, their request (Doc. 174) is denied.

Finally, Jeanne Yokel requests an enlargement (Doc. 175) because she was allegedly unsure as to whether she is a member of the class. In her unverified request, Yokel asserts that the confusion was caused by her receiving a class notice even though she purchased an odd premium/even face value whole life insurance policy. Yokel's attorney qualifies her claim as "churning" and unrelated to the claims involved in this action.

Whether Yokel's policy is odd premium/even face value or even premium/odd face value is of little relevance in determining whether she is a class member. That information was relevant to identifying potential class members and determining whether a policyholder should have received a class notice. Thus, Yokel had no legitimate basis for being confused.

If Yokel was in doubt about her status, she should have erred on the safe side and protected her interests by submitting a timely request for exclusion.[5] The second sentence of the class notice states, "The purpose of this Notice is to advise you concerning three decisions you *must* make." (emphasis added). The class notice clearly informed Yokel that by failing to exclude herself she would be relinquishing her rights to file an individual lawsuit against Metlife and that she would be bound the adjudications in this action. Because Yokel has not shown excusable neglect for her failure to submit a timely request for exclusion, her request for enlargement (Doc. 175) is denied.

Although each of the applicants' requests is denied, any applicants wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed proof of claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

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5. Alternatively, prior to the June 13, 1994, deadline, Yokel could have sought a declaration that she is not a class member. At that time, she could have obtained attorney Behrend's assistance with the class notice and determined whether declaratory relief was necessary. If Yokel sought his advise in August, she could have done so in June, before the relevant deadline. *See In re VMS Partnership Secs. Litig.*, 26 F.3d 50, 51-2 (7th Cir. 1994). As mentioned earlier, the class notice that Yokel received informed her that she could not only seek assistance from her own attorney, but could contact class counsel or the Claims Administrator for additional information.

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

Before the Court is a petition (Doc. 178) filed on September 21, 1994, by 26 individuals (the "petitioners") seeking a declaration that they are not members of the class. In the petition, these alleged policyholders assert that they "were aware that life insurance was part of the purchase they made from Metlife." Because they did not receive a class notice, the petitioners claim to be uncertain as to whether they are considered class members. Apparently, the petitioners wish to pursue individual claims against Metlife.[1]

However, the petitioners fail to provide any affidavits or other admissible evidence verifying their assertions. Further, even if they purchased their life insurance policies during the relevant period, the petitioners' allegations are insufficient to find that they are beyond the scope of the class definition. The settlement class consists of:

> all persons who purchased a Metlife whole life insurance policy as a retirement and/or other savings plan or vehicle, *based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products*, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of Metlife between January 1, 1990 and October 31, 1993.

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1. The petitioners appear to be trying to do indirectly what they are unable to do directly. The deadline for opting out of the class has passed. Absent sufficient cause, all persons who qualify as class members are bound by the terms of the settlement agreement and this Court's orders.

See April 22, 1994, order (Doc. 48). Awareness that the product included life insurance fails to equate with making the purchase "based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products."

The Court is unwilling (1) to declare that a group of 26 individuals is not a part of the class or otherwise (2) to unravel in a piecemeal fashion and without sufficient cause the court-approved settlement. As mentioned in a separate order, one of the bargained-for purposes of the $76 million settlement agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Granting the petitioners' request without a sufficient basis and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

Accordingly, the petition (Doc. 178) is **DISMISSED WITHOUT PREJUDICE**. As Metlife suggests in its response (Doc. 190), whether a policyholder is a class member is a fact-specific inquiry that must be accomplished on a case-by-case basis. Among the pertinent factual questions may be the date on which the policyholder learned of this action and the pending settlement agreement. Thus, any petitioner wishing to obtain a declaration of their status in relation to this class action shall file on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence.

Pursuant to Rule 53, Federal Rules of Civil Procedure, and consistent with the terms of the settlement agreement (Doc. 35) and the applicable order (Doc. 48), Peter Grilli is appointed as a special master. Because of the large volume of petitions that may be filed, exceptional conditions require this appointment. Any petitions or other requests seeking either a declaration that an individual is not a member of the class or some similar relief are **REFERRED** to the special master to conduct any proceedings, including evidentiary hearings, to

prepare reports and recommendations. Each report and recommendation shall contain findings of fact and conclusions of law. Mr. Grilli shall be compensated for his time at $150 per hour and reimbursed for all out-of-pocket expenses in connection with the performance of his duties. Unless otherwise agreed to by the parties, the fees and costs associated with each petition shall be shared equally between the petitioner and Metlife. Mr. Grilli shall be paid the fees and costs immediately upon his submission to the Court of the report and recommendation.

In light of the allegations in the petitions, the possibility exists that some, and possibly all, of the petitioners may qualify as class members. As class members, prior to June 30, 1994, they could have elected the options contained in the settlement agreement (*i.e.*, annuity or cash refund). In its response (Doc. 190), Metlife offers the petitioners the same settlement options that were available initially to them even though the time for submitting a completed proof of claim form has passed. Metlife is now bound to honor that offer. Any petitioner wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

Before the Court is Ronald and Anissa Coulter's "Petition for Injunctive Relief Pursuant to F.R.C.P. 23(d) for Restraint of Improper Communications and For Remedial Measures to Rectify Defendant's Improper Contacts in Violation of Local Rule 4.04, and for Sanctions" (Doc. 188), filed on October 4, 1994.

In their unverified petition, the Coulters and their attorney Kenneth Behrend allege, among other things, that (1) "Metlife and/or its agents made contact with potential class members, with the aim of sabotaging the class notice," (2) "Metlife and/or its counsel permitted the class notice to be sabotaged," (3) class counsel breached a duty to prevent Metlife's alleged deceptive practices with relation to the class notice, (4) Metlife, contrary to its representations to the Court, failed to comply with the class notice procedures, and (5) Metlife's counsel breached their duties as officers of the Court. They allege also that either (1) Metlife's counsel informed Metlife of the local rules precluding it from contacting class members, and Metlife disregarded its lawyers' admonishment or (2) Metlife's counsel failed to inform its client of this provision and "purposely ignored" the rules. The Coulters and their attorney assert that the alleged actions by Metlife and its agents are "subversive and misleading" and a part of an "explicit plan" to dissuade class members from electing the settlement options.[1]

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1. Ironically, throughout their involvement with this action, the Coulters and their attorney, Kenneth Behrend, have asserted vigorously that class members should reject the terms of the settlement agreement and refuse to participate in the proceeds. Mr. Behrend has filed papers on behalf of 42 individuals seeking to avoid the settlement and has encouraged even more to do the same.

The Coulters and their attorney fail to provide any evidence whatsoever to support these extremely serious allegations against Metlife, its attorneys, and class counsel. The petition appears to have been filed for the sole purpose of causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorney.[2] In fact, the Coulters request, among other things, the entire notice procedure approved by this Court redone, their lawyer appointed co-class counsel in this action, and an award of attorneys' fees and costs for the preparation of the petition.

For all the reasons established in the responses filed by class counsel and Metlife (Docs. 195 and 206, respectively) and the supporting affidavits (Docs. 193, 194, 201, 202, 203, 204, and 205), the Coulters' petition (Doc. 188) is **DENIED**. Because the petition is unworthy of additional consideration, and because the Coulters and their attorney have consumed already an inordinate amount of the parties' and the Court's resources, no further explanation of the denial is warranted.

In the final paragraphs of its response (Doc. 206), Metlife stops short of qualifying the Coulters' petition as frivolous and requesting sanctions against them and their attorney. As Metlife probably recognizes, that request may cause additional delay of this action, which, in turn, would cause an injustice to the more than 20,000 class members awaiting restitution. However, admonishing the Coulters and their attorney is appropriate under the circumstances. They should remain mindful of the provisions of Rule 11, Federal Rules of Civil Procedure. Rule 11 precludes the filing of superfluous motions for the purposes of wasting valuable resources, perpetuating undue delay, and serving

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2. On March 24, 1994, the Coulters filed in Pennsylvania their own lawsuit against Metlife. In that action, which has been stayed pending resolution of this proceeding, they seek class certification. This class action and the settlement agreement related to it may preclude the Coulters from prosecuting their claims in the Pennsylvania action.

illegitimate self-interests. If applied to the papers filed by the Coulters and their attorney, Rule 11 might well trigger relief markedly different in both effect and object from that which they proposed or contemplated.

ORDERED in Tampa, Florida, on October __, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING FAIRNESS OF CLASS ACTION SETTLEMENT

Before the Court is a joint motion by the named plaintiffs and the defendant, Metropolitan Life Insurance Company ("MetLife"), for approval of the proposed settlement in this action. (Docket No. 35.) This motion has been fully briefed, supported by affidavits, testimony and documents in the record, and was the subject of a full day hearing on July 18, 1994.

Based on these submissions, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

1. On November 1, 1993, the named plaintiffs filed their Class Action Complaint and Jury Demand. An amended complaint followed on November 19, 1993, with a second amended complaint on February 14, 1994 (the "*Horton* Complaint"). The *Horton* Complaint asserted claims based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"), the Florida Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.103(1), and the common law of fiduciary duty and fraud. The Complaint sought rescission, restitution, treble damages, punitive damages and attorneys' fees and costs.

2. The central claim in this lawsuit is that certain agents of MetLife allegedly made oral or written sales solicitations to sell whole life insurance as retirement and/or other savings plans or vehicles without fully disclosing that the product sold was life insurance.

3. The lawsuit was filed in the wake of inquiries into similar allegations by the insurance departments of Florida and other states. (*See* Affidavit of Alan Neiditch, sworn to June 27, 1994, ¶¶ 3-5, Docket No. 111.)

Preliminary Court Orders

4. Before any responsive pleadings were filed, the parties entered into a Settlement Agreement on April 4, 1994 (the "Agreement").[1]

5. The proposed settlement offers settlement class members whose whole life policies are still in force the choice of:

- a cash refund of all premiums paid by the settlement class member (less any amounts already paid to him or her by MetLife, such as loans or refunds) plus interest at a rate based on MetLife annuity interest rates (including the effect of compounding);
- an annuity funded in the amount of all premiums paid (less any amounts already paid by MetLife, such as loans or refunds) plus interest; or
- the continuation of their policies.

To class members whose policies are no longer in force, the proposed settlement offers the cash refund. (Agreement ¶¶ 5(b), 5(d), 5(o), 6.)

6. The proposed settlement also provides that MetLife would pay fees and expenses of settlement class counsel as provided in the Agreement, over and above any amount paid to settlement class members, as well as the administrative costs of implementing the settlement, including the fees of the Court appointed Claims Administrator and the costs of producing and

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1. The Settlement Agreement is attached as Exhibit 1 to the parties' joint motion. It is cited herein as "Agreement" followed by the relevant paragraph number.

mailing the individual notice and publishing the publication notice. (Agreement ¶¶ 17-18.)

7. On April 12, 1994, plaintiffs and MetLife filed a joint motion seeking an Order certifying a settlement class, appointing settlement class counsel, preliminarily approving the proposed settlement, approving the form of notice to the settlement class, and scheduling a hearing date for the Court to evaluate the settlement.

8. After hearing argument on the motion on April 19, 1994, the court issued an Order on April 22, 1994 (Docket No. 48), *inter alia*,

(a) certifying as a class under Fed. R. Civ. P. 23(b)(3), solely for the purpose of settlement:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993;

(b) designating settlement class counsel;

(c) preliminarily approving the settlement as sufficiently reasonable, adequate, and fair to warrant notice to the members of the settlement class and a full hearing on the settlement;

(d) scheduling a full hearing on the settlement;

(e) approving the form of notice and accompanying claim form;

(f) approving individual notice to an overly inclusive group of potential settlement class members consisting of: (i) all whole life policyholders who purchased from the Rick Urso & Associates sales office (the "Tampa office") between January 1, 1988 and October 31, 1993; and (ii) certain policyholders who purchased from MetLife's other offices between January 1, 1990 and October 31, 1993, and who were identified statistically as likely to be class members, or were identified empirically (through a survey of MetLife's sales offices and a review of sales literature) as likely to be class members, or complained of sales solicitations similar to those alleged in the *Horton* Complaint; and

(g) approving publication notice in 10 daily newspapers throughout the United States and in two monthly nursing magazines.

9. On April 22, 1994, the Court issued an Order, with the consent of MetLife and settlement class counsel, permitting intervention by the Florida Insurance Commissioner. (Docket No. 47.)

10. On June 14, 1994, the Court issued an Order, pursuant to Fed. R. Evid. 706, appointing an insurance expert for the purpose of analyzing the proposed settlement to assist the Court in evaluating the settlement. (Docket No. 96.) The expert provided consultation to the Court without the filing of a formal report in the court record.

Notice and Response

11. The individual notice was written in plain English and included (i) the caption, (ii) a description of the litigation, (iii) a description of the settlement class, (iv) identification of counsel for the class, (v) notification of the option to enter an appearance personally or through other counsel and the deadline for doing so, (vi) a description of the settlement, (vii) the procedure for filing objections, (viii) the hearing date, (ix) the procedure for filing requests for exclusion and the deadline for

doing so, (x) the consequences of filing an exclusion request, (xi) the consequences of remaining in the settlement class, (xii) the consequences if the settlement is or is not approved by the Court, (xiii) a description of MetLife's responsibility for attorneys' fees and (xiv) the procedure for obtaining additional information. Potential settlement class members with in force policies, who might have been concerned about their policies as a result of the notice, also received a letter from MetLife assuring them that their policies are valid and that MetLife is financially secure. (Ex. A to the Affidavit of G. Peter Buchband, sworn to July 18, 1994, Docket No. 149.)

12. The Proof of Claim form was written in plain English. It required those settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.) In addition, the Proof of Claim form (i) required a notarized signature, (ii) asked which settlement option the class member wished to elect, (iii) requested surrender of the policy and (iv) contained a release.

13. The publication notice contained (i) a description of the litigation and the settlement class, (ii) a description of the settlement, (iii) procedures for filing a request for exclusion and the deadline for doing so, (iv) the hearing date and (v) the

procedures for obtaining further information and a Proof of Claim.

14. The group proposed by the parties and approved by the Court to receive individual notice is likely to include the vast majority of settlement class members. The methodology for identifying this group was necessary because there is no direct way to identify policyholders based on the type of solicitation they received. (Affidavit of Anthony Amodeo, sworn to April 12, 1994, ¶ 5, Docket No. 40.) This methodology was the best means of identifying settlement class members through reasonable efforts and was developed in consultation with, and accepted by, both class counsel and insurance regulators. (Transcript, R. Parry at 98-99; T. Tew at 101-03; Neiditch Aff. ¶ 9.)

15. Individual notice was sent to approximately 71,000 potential settlement class members by the Court appointed Claims Administrator. Of these, a total of 730 (1.0%) were returned undeliverable. (Buchband Aff. ¶¶ 4, 23.)

16. Notices were published in the May 9, 1994 and the May 14, 1994 issues of *USA Today*, *New York Daily News*, *Los Angeles Times*, *Chicago Sun-Times*, *Philadelphia Inquirer*, *Pittsburgh Post Gazette*, *Miami Herald*, *Atlanta Journal and Constitution*, *Dallas Morning News*, *Houston Chronicle*, and *Tampa Tribune*; in the May 9, 1994 issue of the *Birmingham News*; and in the June issues of the *American Journal of Nursing* and *RN Magazine*. These publications on the dates published had a circulation of over 7 million. (*See* Affidavits of Charles Alexander, sworn to July 1 & 18, 1994, Docket Nos. 145 and 149.)

17. As of the hearing date, the Claims Administrator had received a total of 20,706 timely claim forms (29.2% of claim forms mailed) and 513 timely requests for exclusion (0.7% of individual notices mailed). (Buchband Aff. ¶¶ 20, 21, 23.) The Court has directed the parties to meet and agree on the treatment

of late filings and, if no agreement can be reached, to submit these issues to the Court by motion.

18. Only two settlement class members filed timely objections to the settlement.

19. In addition, certain other persons attempted to appear and object. However, their motions were denied as follows:

(a) The motion to intervene (Docket No. 64) by certain former MetLife sales managers — Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes ("the former sales managers") — was denied.

(b) The motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters") was denied. The Coulters also filed a notice of intention to appear and object (Docket No. 119) on July 1, 1994. This objection was untimely, although this untimeliness does not affect their status as settlement class members. Pursuant to this Court's April 22, 1994 Order, objections and supporting memoranda were due to be filed on or before June 13, 1994. (Docket No. 48, ¶ 10.)

(c) The motion filed by the named plaintiffs (Docket No. 106) to dismiss the notices of intention to appear and object to proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes), by Kevin J. Daxon ("Daxon"), and by Daniel Richard Urso ("Urso") was granted. Specifically, Daxon's notice of intention to appear and object (Docket No. 89) was dismissed for lack of standing. Urso's notice of intention to appear and object (Docket No. 94) was dismissed for lack of standing. The former sales managers' notice of intention to appear and object (Docket No. 58) was dismissed by stipulation that the former sales managers are not settlement class members.

(*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Final Settlement Hearing

20. On July 18, 1994, the Court conducted a full day hearing on the fairness of the settlement and related issues, which the parties had fully briefed.

21. At the hearing, the Court heard and considered the objections of the two settlement class members who objected in a timely fashion, the former sales managers, the Coulters, Urso and Daxon before disposing of the motions as described above.

22. At the hearing, class counsel called as a witness David Donaldson, an experienced plaintiffs' class action lawyer from the Ritchie & Rediker firm in Birmingham, Alabama, who testified that the settlement was fair and that the form of individual notice was clear and easily understood. (Transcript, Donaldson at 136-38.) Class counsel had previously filed an affidavit of Mr. Donaldson's partner, David Guin (Docket No. 143), reflecting his view that the settlement was fair.

23. At the hearing, MetLife called as a witness Daniel J. McCarthy, a consulting actuary with the firm of Milliman & Robertson, experienced in life insurance matters, who explained features of the settlement and testified that the settlement, including each of the settlement options as well as the interest rate, was fair and that the individual notice was likely to reach the vast majority of the settlement class. (Transcript, McCarthy at 177-94.)

24. MetLife has committed and confirmed at the July 18, 1994 hearing (*see* Transcript at 200) that it will either (i) provide Restitution (as defined in the Settlement Agreement) to class members who withdrew from the Florida Prepaid Tuition Program or, at the option of the settlement class member, (ii) to

the extent permitted by the Florida Prepaid Tuition Program, obtain those persons' reinstatement in that Program.

Facts Relating to the Fairness of the Settlement

25. The settlement offers full restitution to settlement class members. The settlement is at the top of the range of possible compensatory damages. It is not discounted to reflect the risks, delays or costs of litigation.

26. The following are issues that could present obstacles to plaintiffs' success at trial (which obstacles might or might not be overcome) if this matter were to proceed in litigation:

- establishing the elements necessary to obtain class certification, if this case were litigated rather than settled;
- proving that any settlement class member was unaware that he or she had purchased life insurance in view of written disclosures made to and acknowledgements signed by settlement class members;
- overcoming the defense that their RICO claims are precluded by the McCarran-Ferguson Act;
- overcoming the defense that their Florida Civil Remedies for Criminal Practices Act claims are precluded by the Florida Unfair Insurance Trade Practices Act;
- establishing the necessary elements of their RICO, Florida Civil Remedies for Criminal Practices Act and common law claims; and
- establishing that settlement class members' claims are timely under applicable statutes of limitations.

27. This action, if litigated, would be complex, expensive and time-consuming.

28. Negotiations leading to the settlement lasted several months and, at times, were acrimonious. (*See* Affidavit of Lorna G. Schofield, sworn to June 27, 1994, Docket No. 117;

Affidavits of Ron Parry, sworn to April 19, 1994, Docket No. 45, and June 28, 1994, Docket No. 109, Ex. C; Affidavit of Judy S. Hoyer, sworn to April 7, 1994, Docket No. 109, Ex. D.) There is no evidence of collusion.

29. More than 40 state insurance regulators have approved the substance of the proposed settlement, including the settlement amount and the methods for identifying those persons who received individual notice. (Neiditch Aff. ¶¶ 2, 8-9.)

CONCLUSIONS OF LAW

Subject Matter Jurisdiction

30. The Court has jurisdiction over the federal claims under 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331.

31. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

32. In arguing the weaknesses in plaintiffs' case, MetLife has asserted that the McCarran-Ferguson Act precludes plaintiffs' RICO claims. Plaintiffs have disputed this issue. In either event, the Court has subject matter jurisdiction. Even if MetLife is correct, the Court has subject matter jurisdiction because the federal claims alleged in this Complaint are not devoid of merit on their face. *See Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405, 408 (11th Cir. 1986). Moreover, successfully asserting the McCarran-Ferguson Act as an affirmative defense would result in the dismissal of plaintiffs' RICO claims *on the merits* for failure to state a claim, and not for lack of subject-matter jurisdiction. *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233, 236-37 (2d Cir. 1975).

33. The Court also has determined to exercise its supplemental jurisdiction over state law claims in this case in the interests of judicial economy, convenience, and fairness to litigants, particularly the more than 20,000 who have filed Proof of Claim forms and indicated their desire to accept the restitution set forth in the Settlement Agreement.

Class Certification

34. The certified settlement class is sufficient under Fed. R. Civ. P. 23 for settlement purposes. The standards of Rule 23 for class certification are more easily met in the context of settlement than in the context of contested litigation. *White v. National Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-158 (S.D. Ohio 1992); *Dalkon Shield Claimants' Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.)*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Adequacy of Notice

35. Elements of Rule 23(c)(2) notice (for class certification) are combined with elements of Rule 23(e) notice (for notice of settlement or dismissal) where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action. *Hitt v. Nissan Motor Co. (In re Nissan Motor Corp. Antitrust Litig.)*, 552 F.2d 1088 (5th Cir. 1977).

36. The notices to potential class members provided all the information material to making an informed and intelligent decision whether to participate in the settlement class and the settlement. *See id.* at 1105. This notice fairly and reasonably advised potential class members of their rights under the settlement, and constituted due and sufficient notice for all other purposes to persons entitled to receive notice required by due process and Rule 23.

37. The methodology used to identify potential class members to receive individual notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Rule 23 does not require actual notice to each and every possible class member where, as here, a precise list of actual settlement class members could not be created. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir.

1987), *cert. denied*, 484 U.S. 1004 (1988); *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985). Supplementing individual notice with publication notice represents an appropriate balance between protecting class members and making Rule 23 workable. *See Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *In re Agent Orange*, 818 F.2d at 168-69; *Manual for Complex Litigation, Second* § 30.21 at 223 (1986). The Court concludes that the individual notice and publication notice collectively constituted the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement and settlement hearing, and thereby satisfied the requirements of Rule 23(c)(2) (as well as Rule 23(e)).

Objections

38. Two settlement class members filed timely objections to the settlement with the Court. They asserted, respectively, that (a) the settlement should provide for punitive damages, and (b) the annuity is insufficient settlement relief. These objections were considered and are rejected because the settlement provides 100% of compensatory damages, and punitive and treble damages are not to be considered in determining the upper range of possible recovery for settlement purposes. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993); *Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.)*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

39. The objections raised by the Coulters, although not timely filed, were considered and rejected. The Coulters' objection merely refers back to their motion to intervene and supporting arguments, which were briefed, argued and rejected. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

40. The Court considered the objections raised by the former sales managers and Daxon, even though they are not class members and lack standing to raise the objections. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.) Certain of those objections are antithetical to the interests of the settlement class and are rejected.

41. The remaining objections of the former sales managers and Daxon are as follows:

(a) They objected that the notice does not adequately warn class members of the risks of surrendering their whole life insurance policies and claiming a full refund. This objection is rejected. The notice clearly presented the settlement options and warned policyholders to consider carefully whether cancellation of their life insurance was in their best interests. Such notice is legally sufficient. *Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1974) (fact that notices do not fully explore options is immaterial because class members "are not expected to rely upon the notices as a complete source of settlement information"), *cert. denied*, 423 U.S. 864 (1975); *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1522 (N.D. Ala. 1991) (denying movants' claim that settlement notice was misleading and/or incomplete because it allegedly did not explain effect of settlement provisions on policyholders), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993). The Court concludes that additional information about settlement options would have made the notice lengthy, confusing and would have been inappropriate, particularly in light of the nature of the allegations asserted in this action. *See In re Farmers Group Stock Options Litig.*, [1991-1992] Fed. Sec. L. Rep. (CCH) ¶ 96,522, at 92,378 (E.D. Pa. Dec. 19, 1991) (settlement notice must "be neutral in its description of class member options"; fuller details of settlement options would have "counterproductively engendered confusion" given the speculative nature of information, especially where class members

presumably could consult with their own brokers if they had questions regarding settlement).

(b) The former sales managers and Daxon objected that the release as set forth in the proof of claim is overly broad in that it could cover derivative claims. This objection is rejected. Derivative claims belong to and are brought on behalf of the corporation, and not any individual. *See, e.g.*, Fed. R. Civ. P. 23.1. Derivative claims on behalf of the company relating to the sales solicitations at issue have already been asserted. (*See, e.g.*, Derivative Complaint, Ex. B to the former sales managers' Objection, Docket No. 35.) If those claims result in a recovery in favor of the company, those funds will be paid to the company and not to any individual. *See, e.g., In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.) ("Any relief obtained [in a derivative action] belongs to the corporation only"), *cert. denied*, 469 U.S. 858 (1984); *Recchion ex rel. Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 1309, 1315 n.1 (W.D. Pa. 1986) ("Any recovery in a derivative action belongs to the corporation," citing *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

(c) The former sales managers and Daxon objected that the settlement class includes either too many or too few potential claimants. This objection is rejected. No precise list of settlement class members can be compiled because the parties cannot determine which policyholders received (and relied on) allegedly misleading sales solicitations. (Amodeo Aff. ¶ 5.) Individual notice was provided to an overly broad group of potential settlement class members and was supplemented by broad publication notice. As stated above, the Court has concluded that this notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Notice to a greatly overinclusive group of all MetLife whole life policyholders is unwarranted and impractical because the vast majority of those persons probably knew they were

buying life insurance and were not misled by allegedly improper sales solicitations. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (court did not require individual notice to every Vietnam veteran in order to reach a class consisting of such veterans who had been exposed to Agent Orange).

(d) The former sales managers and Daxon objected that the settlement is collusive. This objection is rejected as baseless. No evidence of collusion exists.

(e) The former sales managers objected that the class definition is inconsistent with the Proof of Claim form in that the latter includes a requirement that a class member certify that he or she had been misled, even though the class definition does not do so. This objection is rejected because the settlement class is properly defined in objective terms. Class membership should not depend on a determination of the merits of each potential class member's claims. *Manual for Complex Litigation, Second* § 30.14 (1986). Moreover, the settlement class was certified for the sole purpose of resolving the claims asserted in the Complaint, which in substance allege that policyholders were misled in the purchase of their whole life insurance policies. Thus, class members who sought to make a claim were appropriately required to assert that they were misled in the purchase of their policy and did not understand that they were buying a life insurance policy at the time they purchased it in order to participate in the settlement.

42. Urso asserted substantially the same objection concerning the certification required in the Proof of Claim form. The Court has considered and rejects the objection for the reasons stated above, even though Urso is not a settlement class member and therefore lacks standing to raise the objection. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Fairness of Settlement

43. There are six factors to consider in determining whether a class action settlement is fair and adequate. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977). These factors support approval of the settlement in this case.

44. (First factor:) The risk that plaintiffs would lose on the merits at trial supports approval of the settlement. *See Bennett*, 737 F.2d at 986.

45. (Second and third factors:) The amount of the settlement, which here is at the upper end of the range of possible recovery, supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

46. (Fourth factor:) The prospect of complicated, expensive and time-consuming litigation if the case were not settled supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Warren v. City of Tampa*, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

47. (Fifth factor:) The virtual lack of objections from settlement class members, and the lack of substance of objections that were made, support approval of the settlement. *Bennett*, 737 F.2d at 986, 988 & n.10; *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Meyer v. Citizens & Southern Nat'l Bank*, 677 F. Supp. 1196, 1212 (M.D. Ga. 1988).

48. (Sixth factor:) The stage of the proceedings at which the settlement was achieved, prior to formal discovery, does not weigh against approval of the settlement. *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. April 1981); *Cotton*, 559 F.2d at 1332. Here the settlement was not discounted to reflect the risk of loss, and class counsel had access to a great deal of

other information, obtained from such sources as extensive press reports, their own clients, and the report of Thomas Tew on behalf of the Florida Commissioner of Insurance. (*See generally* Parry Aff. ¶ 12, Docket No. 109.)

49. The absence of evidence that the settlement is the product of anything other than arm's-length, non-collusive negotiations supports approval of the settlement. *Cotton*, 559 F.2d at 1330; *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Warren*, 693 F. Supp. at 1055.

50. The Court has given weight to the views of counsel who negotiated the settlement as to the merits of the settlement. *See Cotton*, 559 F.2d at 1330; *Ressler v. Jacobson*, 822 F. Supp. 1551, 1552 (M.D. Fla. 1992). The Court has also considered the views of experts who have examined the settlement and found it to be fair and adequate.

51. In addition, the Court has considered and accorded great weight to the approval given to the restitution plan embodied in the settlement by more than 40 independent state insurance regulators around the country as evidence that the settlement is fair and was the product of arm's-length, non-collusive negotiations. *See Marshall*, 550 F.2d at 1178; *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314, 1318 (N.D. Ill. 1993).

52. The settlement is fair, adequate and reasonable and not the product of collusion between the parties.

In Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed October 25, 1994.]

ORDER

Before the Court is a "Petition of Clarence Ridgeway Requesting Exclusion from the Horton Settlement Class" (Doc. 198), filed on October 11, 1994. The plaintiffs filed a response (Doc. 213) on October 18, 1994. As the response points out, the petition fails to establish excusable neglect for Mr. Ridgeway's failure to file a timely request for exclusion. The reasons set forth in the order (Doc. 221) denying similar requests for enlargement apply to Mr. Ridgeway's petition as well.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

[Caption omitted in printing.] [Filed August 22, 1994.]

INTERVENORS' NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(2), Notice is hereby given that Ronald and Anissa Coulter, Representatives of the Coulter Class of Pennsylvania residents similarly injured by MetLife's sale of insurance policies which contain language unapproved by the Pennsylvania Insurance Commission, and a subclass of Pennsylvania residents who purchased retirement plans which in reality were life insurance policies, named as Intervenors in the above-captioned action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order denying the Coulter Class' Motion for Intervention, announced by the Court in this action on the eighteenth day of July 1994.

Respectfully submitted,

/s/ Kenneth R. Behrend
Kenneth R. Behrend
BEHREND & ERNSBERGER
2400 Grant Building
Pittsburgh, PA 15219
phone (412) 391-2515
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DATED: AUGUST 17, 1994

[Proof of service omitted in printing.]

[Caption omitted in printing.] [Filed November 22, 1994.]

NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(1), Notice is hereby given that Douglas and Roena Conner, Ronald and Anissa Coulter, Darrin Johns, Joann Kablach, Eric Maharg, Terrance McConnell, Deborah Myers, Terry and Marjorie Palmer, Brian Rohm, James and Mary Romano, Albert Darren Wise, and Jeanne Yokel, named as Petitioners in the above-captioned action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order denying their Requests For an Enlargement of Time Within Which To Seek Exclusion from the Horton Class, issued by the Court on October 25, 1994.

Respectfully submitted,

/s/ Paul A. Nelson

Paul A. Nelson, Esq.
100 West Kennedy Boulevard
Suite 660
Tampa, FL 33602

DATED: NOVEMBER 22, 1994

[Proof of service omitted in printing.]

[Caption omitted in printing.] [Filed November 22, 1994.]

NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(1), Notice is hereby given that Edward Beliunas, Paulette Beliunas, John Brooks, Stephanie Charles, Shelley A. Daughenbaugh, Jerilyn Freiwald, Nina Heathcote, Robert W. Hemcher, Kenneth D. Johnson, Michele R. Johnson, Frieda E. Kamel, Jerome J. Knorr, Enod S. Knorr, George Liptak, Ruth Liptak, Kenneth J. Magnes, Sandra Marie McCue, Mark A. Ondrusek, Ernestine Peterson, Rori K. Rasel, Clarence Ridgeway, Emily N. Riehl, Joan C. Valenta, Robert Dale Wiles, and Catherine Wiles, named as petitioners in the above-captioned action, hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the order denying their Request for a Declaration That They Are Not Horton Class Members, issued by the Court on October 25, 1994.

Respectfully submitted,

/s/ Paul A. Nelson

Paul A. Nelson, Esq.
100 West Kennedy Boulevard
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DATED: NOVEMBER 22, 1994

[Proof of service omitted in printing.]

[Caption omitted in printing.] [Filed November 22, 1994.]

NOTICE OF APPEAL

Pursuant to Fed. R. Civ. P. 4(a)(1), Notice is hereby given that Ronald and Anissa Coulter (Intervenors), hereby appeal to the United States Court of Appeals for the Eleventh Circuit, from the Order denying their Petition for Injunctive Relief Pursuant to Fed.R.Civ.P. 23 (d) for Restraint of Improper Communications and for Remedial Measures to Rectify Defendant's Improper Contacts in Violation of Local Rule 4.04, and for Sanctions, issued by the Court on October 25, 1994. This is not an appeal from the Court's Order approving the Horton Class settlement. This Notice of Appeal does not include any class member who has availed themself of a refund or MetLife annuity pursuant to the Horton Class Settlement Order. The appeal encompasses only those policyholders who did not avail themselves of the relief afforded by the settlement class notice because of communications by MetLife which were not approved by the Court pursuant to Local Rule 4.04.

Respectfully submitted,

/s/ Paul A. Nelson

Paul A. Nelson, Esq.
100 West Kennedy Boulevard
Suite 660
Tampa, FL 33602

DATED: NOVEMBER 22, 1994

[Proof of service omitted in printing.]

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No. 96-423 (5)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RONALD COULTER AND ANNISA COULTER, et al.,

Appellants-Petitioners,

SHERRY HORTON, et al.,

Appellees-Respondents,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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36 pp

LIST OF PARTIES TO THE PROCEEDING

It is unclear from the Petition for Writ of Certiorari if the judgment under review is that of the Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of the United States District Court for the Middle District of Florida and/or the Opinion of the Eleventh Circuit Court of Appeals, Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533 (11th Cir. 1996).

Sherry Horton, Joyce Armbruster and Deborah K. Spamer, individually and on behalf of the settlement class certified by the district court, were the Plaintiffs in the district court and Appellees in the Eleventh Circuit.

Metropolitan Life Insurance Company, Inc. was the Defendant in the district court and Appellee in the Eleventh Circuit.

The Petitioners herein, Ronald Coulter, Anissa Coulter, Douglas Connor, Roena Connor, Darrin Johns, Joann Kablach, Eric Maharg, Terrance McConnell, Deborah Myers, Terry Palmer, Marjorie Palmer, Brian Rohm, James Romano, Mary Romano, Albert Darren Wise, Jeanne Yokel, Edward Beliunas, Paulette

Beliunas, John Brooks, Stephanie Charles, Shelly A. Daughenbaugh, Jerilyn Freiwald, Nina Heathcote, Daniel Heathcote, Robert W. Hemcher, Kenneth D. Johnson, Michele R. Johnson, Frieda E. Kamel, Jerome J. Knorr, Enod S. Knorr, George Liptak, Ruth Liptak, Kenneth J. Magnes, Sandra Maria McCue, Mark A. Ondrusek, Ernestine Peterson, Rori K. Rasel, Clarence Ridgeway, Emily N. Riehl, Joan C. Valenta, Robert Dale Wiles and Catherine Wiles, were not "parties" to the prior proceedings, as argued herein. They were putative intervenors, whose denial of intervention was upheld by the Eleventh Circuit Court of Appeals.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

RONALD COULTER AND ANNISA COULTER, et al.,

Appellants-Petitioners,

SHERRY HORTON, et al.,

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v.

METROPOLITAN LIFE INSURANCE COMPANY,

Appellee-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Petitioners maintain that the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondents herein dispute this jurisdiction, as set forth in the Argument section below.

STATEMENT OF CASE

The general procedural background of this case is set forth in the Eleventh Circuit's decision, Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533, 1535-37 (11th Cir. 1996). This case originated from a class action complaint filed by Respondents, Sherry Horton, Deborah Spamer and Joyce Armbruster (hereinafter Horton Respondents), on November 1, 1994. Their cause of action alleged that Respondent Metropolitan Life Ins. Co., Inc. (MetLife), by and through its agents, had engaged in deceptive sales practices in that it sold whole life insurance policies based upon representations that failed to disclose in whole or in part that the true product being sole was a life insurance policy. Claims were asserted, inter alia, under RICO and common law fraud.

Shortly after initiating the action and before a responsive pleading was filed, MetLife expressed its desire to enter into settlement negotiations with the Horton Respondents. Thereafter the parties engaged in vigorous and at times acrimonious settlement negotiations. Those negotiations culminated in a settlement

agreement, the terms of which were preliminarily approved by the federal district court on April 22, 1994.

The terms of the settlement agreement, as preliminarily approved by the court, provided for conditional approval of a class for purposes of settlement only consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

The contents of the notice and proof of claim form were negotiated and ultimately agreed upon between counsel and presented to the court. The parties discussed the best method in which to identify potential class members based upon the circumstances of the case, the enormous number of MetLife policyholders, the difficulty in isolating those policyholders who may have been subjected to the questioned sales practices and the Horton Respondents' desire to

individually communicate the terms of the settlement to as many persons as possible. A step-by-step procedural formula to identify persons to receive individual notice was agreed upon and approved by the district court.

Thereafter, notice was sent to over 70,000 persons, approximately 20,000 of whom returned the proof of claim form. This was supplemented by publication notice in several national and regional newspapers and specialty journals, as approved by the district court.

A hearing to assess the fairness of the settlement was scheduled with the Florida federal district court for July 18, 1994. Prior to that hearing there began a series of filings precipitated by clients represented by Attorney Behrend. These included a motion filed by the Coulter Petitioners to intervene as named parties in the district court action for the unique purpose of severing not only themselves but all Pennsylvania residents, although they had no authority to speak for others. (App. 101a) The Coulter Petitioners also filed a Notice of Intention to appear and Object to the Settlement and those Objections were overruled by the district court

judge. (App. 83a) There were no significant objections to the settlement by persons other than those clients of Attorney Behrend. In their subsequent appeal to the Eleventh Circuit, the Coulter Petitioners did not appeal the district court's approval of the settlement itself. Grilli, 78 F.3d at 1537 n.6.

Petitioners then also filed Petitions to enlarge the time for exclusion or to declare that they were not class members. Each of these filings had to be addressed by the parties by responsive pleading.

The parties appeared for the settlement hearing and presented evidence to the court of the fairness of the settlement. The court also entertained the various motions advanced by Attorney Behrend up to that point and heard the objections to the settlement advanced by his clients.

Even subsequent to the fairness hearing and prior to the district court's entry of its order approving the settlement, Petitioners represented by Attorney Behrend continued to advance untenable positions to complicate and delay the settlement proceedings, including the filing of a Petition for an Injunction and

Remedial Measures based upon alleged improper communications by MetLife agents with potential class members.

Ultimately in October 1994, the district court entered its detailed Findings and Conclusions regarding the settlement and pending motions. (App. 83a) The district court denied Petitioners' Motion to Intervene. It also denied Petitioners' Request to file late exclusion forms to exclude them from the class action. It denied Petitioners' requested Petition for injunctive relief for improper communications. Finally, as for Petitioners' motion to declare they were not members of the settlement class, the district court appointed a special master and referred this request to the special master for case-by-case, fact specific determinations.

Petitioners next filed four appeals with the Eleventh Circuit Court of Appeals. Petitioners did not challenge the terms of the class action settlement itself in those appeals. Rather, they challenged the district court's denial of their Motion to Intervene, their Request to file late exclusions, their Petition for injunctive relief, and their Motion to declare that they are not members of the class.

This case proceeded through briefing and oral argument in the circuit court. In its reported opinion of April 2, 1996, the Eleventh Circuit not only upheld the district court's rulings, but found the appeals frivolous and ordered double costs and reasonable attorney's fees to appellees. Grilli, 78 F.3d at 1538-39.

Subsequent to the entry of the Eleventh Circuit's ruling, the Petitioners continued on with their court filings. They filed a first Petition for Rehearing with the Eleventh Circuit, challenging the court's award of sanctions and raising what they perceived as "factual and legal errors" with the Court's Opinion. This Petition attempted to reargue the merits of the appeals. The Eleventh Circuit denied this petition for rehearing. Petitioners then filed a motion for leave to file a Second Petition for Rehearing with the Eleventh Circuit, with tendered Second Petition. This Second Petition raised federalism and constitutional arguments as to the approval of the class settlement, similar to those in the question presented herein, but which were not previously raised in the circuit court. The circuit court denied the Motion for Leave to File Second Petition for Rehearing. (App. 75a)

SUMMARY OF ARGUMENT

This Court should deny certiorari. Petitioners herein lack standing to seek a writ of certiorari because they are not "parties" able to seek discretionary review under 28 U.S.C. § 1254(1). The Petitioners were denied intervention in the district court, this denial was upheld by the circuit court and, therefore, they are not named parties to these proceedings.

In addition, Petitioners seek discretionary review of matters beyond the scope of those properly raised and preserved for review. They did not seek review of their denial of intervention and now instead seek to raise constitutional challenges to the district court's approval of the underlying settlement in the case. Petitioners did not challenge the settlement in their appeal to the Eleventh Circuit and this was not the subject of the Eleventh Circuit's opinion. Subsequent to the entry of that opinion, Petitioners moved for leave to file a Second Petition for Rehearing to raise these new challenges to the settlement approval in the Eleventh Circuit. The Eleventh Circuit denied the request, having already heard the merits of the matters properly raised on appeal. Petitioners now seek to have this

Court consider those matters presented in the Second Petition for Rehearing denied by the Eleventh Circuit. This request is beyond the scope of matters properly preserved for appeal by Petitioners.

Finally, even a limited review of the contentions actually raised by Petitioners as being worthy of discretionary review reveals that review by this Court is not compelling. Contrary to Petitioners' legal argument, a federal district court's approval of a nationwide class action settlement pursuant to Federal Rule of Civil Procedure 23 does not violate principles of federalism or run counter to the McCarran-Ferguson Act. That Act is directed to conflicts between state law and Acts of Congress, not application of the Federal Rules of Procedure. No important issue of federal law is implicated.

The petition herein is simply a belated and legally erroneous attempt by the Petitioners to have this Court review the factual and legal findings of the district court when it ruled upon class settlement approval in order to allow Petitioners to continue on with their individual claims despite their failure to opt out of the class. This question was not properly preserved for appeal, nor are such inquiries intended to be addressed with the limited resources of this

Court. This Petition is pursued for the individual benefits of the Petitioners, who did not timely opt out of the settlement in order to pursue individual claims.

ARGUMENT

I. PETITIONERS LACK STANDING UNDER 28 U.S.C. § 1254(1) TO SEEK REVIEW OF THE QUESTION PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI AND THEREFORE THE PETITION SHOULD BE DENIED.

Section 1254(1) provides that Supreme Court review of cases in the Court of Appeals can be sought upon Petition for Writ of Certiorari of any party to the proceeding. 28 U.S.C. § 1254(1). Both the district court and the Eleventh Circuit Court of Appeals denied Petitioners' Motion to Intervene as named parties to this action. One who is refused intervention as a party may seek review of that denial. See Robert Stern & Eugene Gressman, et al., Supreme Court Practice, § 6.16 (7th ed. 1993) (enumerating cases).

Supreme Court Rule 14.1(a) provides that

> [t]he statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly

> included therein, will be considered by the Court.

Sup. Ct. R. 14.1(a). In their Petition for Writ of Certiorari, Petitioners failed to requested review of the lower court's denial of their intervention motion.

As this Court has previously held, review of a denial of intervention is not subsidiary to a stated question, but rather is a threshold inquiry. Izumi Seimitsu v. U.S. Philips Corp., 510 U.S. 27, 114 S. Ct. 425, 427 (1993). Nor can a challenge to the federal court's denial of Petitioners' Motion to Intervene be said to be "fairly included" in the single question set forth in the Petition.

As this court noted in Izumi, determining the propriety of the denial of a motion to intervene is both analytically and factually distinct from a question presented that is directed to the merits of the case. Id. Similarly, such as the case herein. Petitioners present to this court a question completely unrelated both factually and legally to the question of whether Petitioners should have been permitted to intervene as named parties in the underlying proceeding. In addition, while in their Petition for Writ of Certiorari Petitioners discuss the lower court proceedings on their

Motion to intervene, this alone is insufficient to bring this threshold question within the question presented for review. Id. at 427 n.5.

Nor is this the exceptional case for which Rule 14.1(a) should be disregarded. Respondents herein submit that the question presented by Petitioners does not fall within the realm of those matters for which this court has disregarded Rule 14.1(a). See id. at 428 (discussing those circumstances where this court has granted exception to the requirements of Rule 14.1(a)). This court expressly admonished those intervenors petitioning the Court of the need to properly comply with Rule 14.1(a) and thereby avoid requiring the Court to consider disregarding the Rule and reversing the denial of intervention in order to reach the actual question presented. Id. at 428.

Accordingly, Respondents respectfully submit that Petitioners herein are not named parties to these proceedings within the parameters of Rule 14.1(a) and have failed to seek review from this Court of the denial of their motion to intervene -- the sole issue for which they have standing.

II. PETITIONERS' QUESTION PRESENTED IS OUTSIDE THE SCOPE OF MATTERS RAISED BY PETITIONERS IN THE COURT BELOW AND THEREFORE THE PETITION SHOULD BE DENIED.

In the "Opinions Below" section of the Petition, it indicates that the opinions on review are the reported decision of the circuit court and the opinion of the district court. (App. 83a) The referenced district court opinion is actually its ruling on the Petitioners' Motion to Intervene. However, in this Court Petitioners now seek to challenge in their question presented and Petition the district court's approval of the class action settlement. While Petitioners argue the merits of this approval in their Petition, the Findings approving the settlement are not included in the appendix nor are they within the scope of matters properly raised for discretionary review.

There were four distinct appeals presented to the Eleventh Circuit. They were requests for review of the district court's decisions concerning (1) Petitioners' motion to intervene, (2) Petitioners' motion for late exclusion, (3) Petitioners' request for injunctive relief for restraint of improper contacts and for sanctions, and (4) Petitioners' motion to declare that they were not members

of the settlement class. The Eleventh Circuit affirmed the district court's denial of intervention, late exclusion, and injunctive relief, and the district court's referral of the motion for declaration of nonclass status to a special master. Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d at 1536-37.

Petitioners sought to raise in the Eleventh Circuit, by way of Second Petition for Rehearing, issues of federalism and constitutional concerns over the district court's approval of the class action settlement. These matters were not raised as part of the original appeals that were timely filed and considered by the Eleventh Circuit. The Motion for Leave to File a Second Petition for Rehearing was denied. (App. 75a) The Eleventh Circuit did not consider nor rule upon the legal issues raised by Petitioners for the first time in their Second Petition for Rehearing.

Although the request to file the Second Petition for Rehearing was rejected, these new challenges to the district court's approval of the settlement were then raised by Petitioners in their Petition submitted to this Court. They seek in their question presented to resurrect those issues incorrectly presented to the

Eleventh Circuit for review and rejected by the Eleventh Circuit. These matters are outside the scope of those matters reviewed in the court below.

The question presented by Petitioners was not properly raised in the lower court and therefore this court should not now consider it. Delta Airlines v. August, 450 U.S. 346, 362 (1981). The matters involved in consideration of the question presented herein were not involved in the lower court and this court does not normally determine questions not so raised. Youakim v. Miller, 425 U.S. 231, 234 (1976); United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980); and Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970).

Accordingly, because the matters now sought to be raised by Petitioners before this court were not properly raised in the court below and preserved for review, this court should not now entertain consideration of the matters in the question presented.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT FAILS TO ARTICULATE SUFFICIENT REASON FOR THIS COURT TO EXERCISE DISCRETIONARY REVIEW.

Arguing that they are parties to the Eleventh Circuit decision, Petitioners herein seek review under 28 U.S.C. § 1254(1). As set forth above, the question presented in the Petition was not actually part of the Eleventh Circuit proceedings nor do the Petitioners have standing to raise such a question. If this court nevertheless determines that these circumstances do not warrant denial of the Petition, the Petition should be denied because it fails to fall within the considerations prompting a review on a writ of certiorari as set forth in Supreme Court Rule 10. Indeed, the Petition fails to even address the specific considerations set forth in Rule 10 and it lacks clarity in its identification of reasons certiorari review is compelling.

In reviewing the Petition, Petitioners apparently argue that the actions of either the Eleventh Circuit or the federal district court in Florida conflict with other decisions of this Court and raise important federal statutory and procedural issues. These contentions are without merit.

Under Rule 10(a), one reason for granting certiorari may be where there is a conflict among the circuits, see e.g., Mitchell v. H.B. Zachry Co., 362 U.S. 310 (1960), or a conflict between a circuit court ruling and Supreme Court precedent. The actual decision of the Eleventh Circuit in Grilli v. Metropolitan Life Ins. Co., Inc., 78 F.3d 1533 (11th Cir. 1996) is not in direct conflict with a decision of any other United States Court of Appeals on those matters reviewed therein. The Eleventh Circuit properly reviewed those four matters brought before it on appeal --- propriety of the district court's denial of intervention, denial of Petitioners' request to file a late exclusion, denial of the petition for injunctive relief and referral of the motion to declare nonmember status to the special master. See id. at 1536-37. There has been no allegation that any of these rulings are in conflict with rulings of another circuit or this Court.

Under Rule 10(c), one reason for granting certiorari is where a United States Court of Appeals has decided an important question of federal law that should be settled by this Court or that conflicts with relevant decisions of this Court. Again, Petitioners have failed

to establish this in their petition nor can they because such circumstances do not exist in this case. The legal issues preserved for review and actually decided by the Eleventh Circuit do not involve important questions of federal law that should be settled by this Court. They concern review of fact specific issues ruled upon by the district court. Nor do the rulings of the Eleventh Circuit in its reported Opinion conflict with relevant decisions of this Court.

Thus, there is nothing within the reported decision of the Eleventh Circuit warranting discretionary review. Instead, Petitioners rely upon the same arguments set forth in their Second Petition for Rehearing as supportive of discretionary review. While these arguments were not properly raised and preserved for appellate review, a review of those arguments reveals that they also fail to satisfy the relevant considerations to warrant discretionary review. In their Petition, Petitioners raise essentially two arguments. First, that states have a strong interest in regulating fraudulent conduct of insurers in their state and second, that the district court's approval of a nationwide class action settlement pursuant to Civil Rule 23 constitutes a regulation of insurance sales in and among the states

violative of the McCarran-Ferguson Act, 15 U.S.C. § 1012, and principles of comity and state sovereignty.

Petitioners' first argument provides no foundation for granting discretionary review. Relying upon this court's decision in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S. Ct. 1032 (1991), Petitioners submit that states have a strong interest in regulating an insurer's fraudulent sales conduct within that state. Respondents herein have no reason to dispute this general legal proposition. Nor does the Eleventh Circuit's decision conflict with this general proposition. This general interest of states in regulating the insurance industry within their boundaries presents no special or important reason beyond the academic and hypothetical and therefore is insufficient to warrant discretionary review. See, Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955).

Petitioners' second contention is that the district court's approval of a nationwide class action settlement pursuant to Federal Rule of Civil Procedure 23 constitutes the regulation of insurance sales and that such regulation conflicts with the McCarran-Ferguson Act and principles of comity and state sovereignty. As with the first

contention, this second contention likewise provides no foundation for granting discretionary review.

In essence, Petitioners claim that this "decision" by the district court to approve the class action settlement, which was not part of the Petitioners' appeal to the Eleventh Circuit, conflicts with federal law and federalism concerns because it regulates insurance. In actuality, the Petitioners' contention that the lower court's approval of this nationwide class action settlement pursuant to Rule 23 constitutes the regulation of insurance is nothing more than the Petitioners' attempt to attack the lower court's approval of the class settlement. As noted, the Petitioners did not appeal the district court's approval of the negotiated settlement to the Court of Appeals. A grant of certiorari by this Court may be of great practical importance to Petitioners because they failed to promptly opt out and pursue their individual claims for damages specifically authorized under Pennsylvania law. However, this is not a sufficient reason for granting certiorari. See Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 114 S. Ct. 1359, 1362 (1994).

As noted in the district court's Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object (App. 83a), the court assessed the adequacy and fairness of this settlement based upon federal procedural law (97a-98a), without the need to resolve constitutional limits under due process based upon application of state choice-of-law principles. Cf. Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) (court should avoid passing upon constitutional issues unless unavoidable to do so.) It is within the authority of the district courts to review and approve such nationwide class action settlements pursuant to Rule 23. See, e.g., Miller v. Republic Nat'l Life Ins. Co., 559 F.2d 426 (5th Cir. 1977); Maywalt v. Parker & Parsley Petroleum Co., 864 F. Supp. 1422 (S.D.N.Y. 1994), aff'd, 67 F.3d 1072 (2d Cir. 1995); Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992); In re A.H. Robins Co. (Breland v. Aetna Casualty & Sur. Co.), 85 B.R. 373 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

While Petitioners rely upon Georgine v. Amchem Prod., Inc., 83 F.3d 610 (3d Cir. 1996), cert. granted 1996 WL 480936 (Nov. 1, 1996) that decision is not applicable here, nor is the case herein directly in conflict with it. Georgine involves a challenge to a federal court's certification of a Rule 23(b)(3) class for purposes of settlement of mass toxic tort asbestos litigation. That case involved a properly preserved challenge to Rule 23 certification. The Third Circuit rejected the federal district court's certification of Rule 23(b)(3) class for settlement purposes, finding that the certification requirements were not met in that particular mass tort context. This Court has granted certiorari of that ruling. Nevertheless, the Eleventh Circuit's Opinion on the four issues raised on appeal before it does not conflict with Georgine. In addition, Petitioners did not appeal to the Eleventh Circuit the district court's approval of settlement, nor does this case deal with class certification issues in the mass tort context. Instead, and according to the Petitioners' question presented, the circumstances herein involve the regulation of insurance, not mass tort litigation.

In their Petition, Petitioners point to virtually no authority to support their position that approval of a nationwide class action settlement in this case constitutes the "regulation of insurance," other than their own conclusory statements. Petitioners try to analogize this case to authorities which are not on point. Petitioners cite F.T.C. v. National Casualty Co., 357 U.S. 560 (1958) to support their position that approval of a class action settlement constitutes a regulation of insurance sales. In that case a specific federal agency, the Federal Trade Commission, attempted to directly regulate the advertising practices of insurance companies by express orders. This is obviously a direct regulation of insurance quite different from the circumstances herein. The court is not a federal commission, nor is there any direct and express attempt to impose specific regulation on a nationwide basis upon the insurance industry as in National Casualty Co. The negotiated class action settlement in this case for the payment of 100% restitution to class member policyholders does not, either directly or indirectly, constitute a regulation of insurance industry practices, nor has the court's

approval of the settlement of this case in any way infringed upon the states' ability to regulate insurance practices.

Nor can the federal district court's approval of settlement pursuant to federal procedural law and specifically Rule 23 be considered as conflicting with or violative of the McCarran-Ferguson Act, assuming arguendo that Petitioners' characterization as regulation of insurance sales had some merit. The Act provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State, for the purpose of regulating business of insurance...

15 U.S.C. § 1012(b). Rule 23 and the federal procedural law regulating class actions is not an "Act of Congress."

The only relationship that the McCarran-Ferguson Act bears to these proceedings is as to the question of subject matter jurisdiction. This action originated as a RICO claim, 18 U.S.C. § 1962, with supplemental state law claims. Prior to considering approval of the class action settlement, the district judge asked the parties to address whether the district court had jurisdiction to

consider approval of a class action settlement, as Respondent MetLife contended, if the McCarran-Ferguson Act preempted that RICO claim. As these Respondents noted to the district court, there is authority supporting the proposition that the McCarran-Ferguson Act would not preempt the RICO claim, see, e.g., Merchants Home Delivery Services, Inc. v. Hall & Co., 50 F.3d 1486, 1489 (9th Cir. 1995), cert. denied Prometheus Funding Corp. v. Merchants Home Delivery Services, Inc., 116 S.Ct. 418 (1995), and that the RICO allegations advanced by Respondents presented a colorable claim sufficient to invoke the district court's subject matter jurisdiction, see Angela R. by Hesselbein v. Clinton, 999 F.2d 320, 324 (8th Cir. 1993), even where that federal claim may later be dismissed. Nelson v. Greater Gadsden Housing Auth., 802 F.2d 405, 408 (11th Cir. 1986). In its Findings of Fact and Conclusions of Law Regarding Fairness of Class Action Settlement (which Petitioners appropriately have not included in their appendix, although their Petition inappropriately challenges the merits of those findings) the district court found it had subject matter jurisdiction to approve the settlement.

Nor does the additional authority Petitioners submit in their Supplemental Brief lend any further support to their position. In Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996), this Court held that the Eleventh Amendment prohibits Congress from authorizing federal court suits by Indian tribes against states under The Indian Gaming Regulatory Act. Id. at 1133. Petitioners seek to rely upon this Court's emphasis in Seminole Tribe that the sovereignty of the states must be maintained and generically apply that emphasis to its argument that state sovereignty has been usurped by the Florida district court in violation of the McCarran-Ferguson Act. The Seminole Tribe decision and the case herein are not comparable. Petitioners mistakenly believe that the court's application of a Federal Rule of Civil Procedure can be violative of the McCarran-Ferguson Act. See Supplemental Brief, p. 5 ("we have the incongruous result of the insurance regulatory laws of the sovereign States being abrogated by a Federal Rule of Civil Procedure"). The Act is directed to conflicts between state and federal law (Acts of Congress) as to the business of insurance and the preemptiveness of federal law under those circumstances.

Petitioners further contend that this so-called regulation of insurance by approval of a nationwide class action settlement violates comity and state sovereignty, in conflict with the Supreme Court's decision in BMW of North America v. Gore, 116 S. Ct. 1589 (1996). While that case can be characterized as dealing with the general proposition of whether a judicial ruling can constitute state regulation, the specific holding of that case is not analogous. There, the specific award of punitive damages under Alabama law in an Alabama state court was held to infringe upon the ability of other states' rights to regulate business within their boundaries. In the case herein, the court assessed a negotiated settlement, not a specific verdict based upon application of a specific state law. The district court herein considered federal principles governing approval of class action settlement, not the assessment of specific damages under Florida or any other state law. The action of the court in approving this settlement is not an infringement on the states' rights or ability to regulate the insurance industry within each particular state. Therefore, this case is not in conflict with this court's reasoning or holding in BMW v. Gore.

Nor is Petitioners' reliance on Gregory v. Ashcraft, 501 U.S. 452 (1991), appropriate. That case involved a conflict between a Missouri constitutional provision and the ADEA and whether the federal law prevailed over the state constitutional provision given the Supremacy Clause. The concerns of state sovereignty in that regard bear no relationship to federalism concerns based upon a federal court's exercise of valid procedural laws.

CONCLUSION

Supreme Court Rule 10 provides that a petition for writ of certiorari is granted for compelling reasons. The Petitioners present no compelling reasons to support this Court's exercise of its limited judicial resources. Not only do the specific contentions raised by the Petitioners fail to raise important constitutional or statutory issues or directly conflict with rulings of this Court or any other circuit court, but Petitioners also have failed to properly preserve these issues for discretionary review and lack standing to present these issues before the Court. For these reasons, Respondents respectfully submit that the petition should be denied.

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IN THE

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October Term, 1996

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Plaintiffs-Respondents,

—v—

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO METROPOLITAN'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

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REPLY TO METROPOLITAN'S BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

The brief in opposition on behalf of the respondent, Metropolitan Life Insurance Company ("Metropolitan") misconstrues not only certain principles enunciated by this Honorable Court in recent decisions, but also the significance of the McCarran-Ferguson Act. Metropolitan uses procedural nuances and selective facts to enhance its argument in an attempt to dance

past state sovereignty, notice and fair hearing, and the McCarran-Ferguson Act. If one accepts Metropolitan's version of history, the courts below only made decisions on procedural matters; they never made decisions on matters involving the application of substantive law. The McCarren-Ferguson Act commands the application of State law to the "business of insurance"; instead, in the instant case, Federal Rule of Civil Procedure 23 was applied. It is difficult to comprehend what substantive law was applied to decide this case.

In BMW v. Gore, 116 S.Ct. 1589 (1996), the majority opinion contains expressions of sound principles regarding attempted extraterritorial application of judicial power, which is the main issue in the instant case.

The Seminole Tribe decision stands for the keystone principle that "each State is a sovereign entity in our federal system", 116 S.Ct. at page 1122. Metropolitan demeans this by saying: "what petitioners call State sovereignty" (Respondents Brief p.20, ftnt. 11).

The same attitude is reflected in the treatment of the

McCarran-Ferguson Act by Metropolitan. It is apt for the petitioners to review the historic background of the McCarran-Ferguson Act, 15 U.S.C.A. 1011-15, c. 20, 59 Stat. 33, March 9, 1945. It was occasioned by the 1944 decision in United States v. South-Eastern Underwriters Association, et.al., 322 U.S. 533, that the business of insurance constitutes interstate commerce subject to regulation by the Congress. In light of the fact that the insurance business had been historically regulated by the States and with the thought that a continuation of that status would provide more effective regulation than national regulation, the Congress passed the McCarran-Ferguson Act in 1945.

With the filing of Coulters' Class Action Complaint in Pennsylvania state court on March 25, 1994, the issue of States' rights to regulate insurance was asserted. When the complaint was filed, no class settlement in Horton had been reached. This action was removed by Metropolitan to federal court (W.D.Pa. No 94-0629). Metropolitan then moved for a stay of the Coulters' case, which was granted because of the Horton case. The stay order made it impossible for the Coulters to move for class certification

and designation of class counsel. The stay order and the representations by Metropolitan, that the two cases overlapped (App. 69a), caused the Coulters to intervene in Florida to protect their State rights.

The case then took a bizarre twist. The Coulters were found to be class members of the Horton class, even though they did not meet the qualifications for class membership.

Metropolitan clearly represented to the district court that the criteria for class membership is set forth in the Proof of Claim Form, in which a proposed member of the class must swear or certify under penalty of perjury as follows:

> . . . 3. **I was misled by this sales solicitation and did not understand that I was buying a life insurance policy at the time I bought it.**

In particular, during the evidentiary hearing on the adequacy of the proposed settlement in Horton, Metropolitan's lead counsel stated on two occasions during the hearing, that Metropolitan excluded those who knew they were purchasing life insurance at the time they purchased their insurance product because they were not part of the class.

The language of this Proof of Claim Form, developed in negotiations of the Horton class and approved by the Horton court, clearly prohibits the Coulters from becoming members of the Horton class action, because the Coulters knew that they were buying life insurance at the time they bought it. Coulters' Second Amended Complaint clearly discloses that the Plaintiffs knew that the product they were purchasing contained life insurance. This is exactly the type of qualification which Metropolitan's lead counsel stated excluded individuals from the Horton class. Nevertheless, the district court found them to be Horton Class members!

Metropolitan goes to great length to point out that the Coulters have acted in some inappropriate manner by not "opting-out" of the Horton action. The question is asked, why should someone "opt-out" of a class action, wherein the Proof of Claim Form sets forth that they are prohibited from participation in the class and its proceeds, since they cannot fulfill the prerequisites for class membership.

Coulters, et.al., have continually asserted that they are not members of the Horton class, as described. Their objective was to

protect themselves and not to destroy the Horton class. Hence, no appeal of the Horton settlement was taken.

Metropolitan also argues that the petitioners should not be allowed to be heard by this Honorable Court, because the nationwide injunction was not issued until after the court of appeals had made its decision. Unfortunately, the petitioners are confronted with, and adversely affected by, a judicial order in this case that purports to deny them the legal right to pursue remedies granted by the statutes of their sovereign State. It would be entirely appropriate, for this Honorable Court to pierce this veil of procedural subterfuge and deal with the legal realities that the Coulters did not have their rights protected.

As to standing, the critical fact is that the district court found the Coulters to be members of the class, which was in one of the four orders appealed by the Coulters to the Eleventh Circuit. (App. 5a, 9a, 32a, 42a,) The Coulters, as members of the class action, become a "party" to the case and fulfill the requirement of 28 U.S.C. Sect.1254(1). A putative class member is a party for appeal purposes. See United Airlines v. McDonald, 97 S.Ct 2464,

432 U.S. 395(1977).

On the point of the Coulters requesting the district court to protect their rights as Pennsylvania citizens, Metropolitan contradicts itself. On page 7, it states "Coulters never asked the District Court to establish a 'subclass' of the Horton class." However, on page 8, it quotes the district court as holding that "The Coulters have no right to speak for the putative subclass they allege."

It must be kept in mind that the petitioners consistently maintained in the courts below that their interests could not be adequately represented unless they were severed from the Horton class or were placed in a separate subclass. Subsequent events have proved they were exactly correct.

Metropolitan's original position opposing the Coulters request to be part of Horton has changed now that Metropolitan has the benefit of an approved class settlement and a nationwide injunction. Metropolitan has moved that the Coulter case in Pennsylvania be transferred to Florida and dismissed because of the settlement and the nationwide injunction.

At page 16, Metropolitan's brief in opposition dismisses the decision in Georgine v. Amchem Products Inc., 83 F.3d 610 (3rd Cir. 1996), as being "completely irrelevant."

The Georgine case holdings on adequacy of representation are extremely relevant. Basic to these holdings is the following statement at 63 F.3d 610, 627:

> (W)e must apply an individualized choice of law analysis to each plaintiff's claim see **Phillips Petroleum Co. v. Shutts**, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L. Ed. 2d, 628 (1985), (constitutional limitations on choice of law apply even to nationwide class actions) ... . The states have different rules governing the whole range of issues raised by the plaintiffs' claims ... .

As petitioners have pointed out, the district court thought that it had avoided the constitutional limitations and the McCarren-Ferguson Act by relying on Federal Rule of Civil Procedure 23. (App. 97a-98a)

The Georgine court found a lack of adequacy of representation because of a conflict of interest. In the instant case, the class representatives and class counsel agreed to a settlement which bargained away the rights to statutory, compensatory, and

punitive damages that petitioners are seeking under Pennsylvania law.[1] This is a vivid example of conflict of interest.

The refusal by both the district court and the court of appeals to apply Pennsylvania law to the claims of Pennsylvania citizens, or even to acknowledge the existence of Pennsylvania insurance regulatory law, and choose instead to rely on a Federal Rule of Civil Procedure, certainly constitutes an issue adjudicated by the courts below and certainly constitutes "an important question of federal law that has not been, but should be, settled by this Court", as stated in Supreme Court Rule 10. This issue was raised in both the courts below, and give the Petitioners standing to appeal. It is the Petitioners' substantive rights that have been taken, the named class plaintiffs and the defendant did not have their rights taken and thus have no desire to protect the interests

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[1]To settle the class action as it was set forth, without modification, the class plaintiffs' counsel were to be paid $2,750,000.00, (two million, seven hundred and fifty thousand dollars) and thus had an strong incentive to not alter, or modify anything as proposed in the class settlement, even though the Coulters raised the issue of protecting their Pennsylvania rights, prior to the district court finally approving the terms of the settlement. In fact, not only did Plaintiffs counsel not do anything to protect the Coulters, they joined in with Metropolitan in opposition to the Coulters.

of the Petitioners.

The issue raised in this Petition for Writ of Certiorari is of great importance to the hundreds of thousands of policyholders who have been defrauded and have claims presently before two panels on Multi-District Litigation which are striving towards nationwide settlements, without consideration of the States' rights issue, as raised in the present case, (the MDLs involve Prudential[2] and Metropolitan), as well as the nationwide class actions filed against other insurance companies in both federal and state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] The Prudential Insurance MDL has a proposed nationwide settlement, presently under consideration.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS TO BRIEF IN OPPOSITION OF PLAINTIFFS-RESPONDENTS

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REPLY BRIEF OF PETITIONERS TO BRIEF IN OPPOSITION OF PLAINTIFFS-RESPONDENTS

The brief in opposition of plaintiffs-respondents mischaracterizes and misrepresents the motives of petitioners and the course of events in this case.

In the interest of brevity, only a few such examples will be discussed in this reply brief. Perhaps the fundamental problem is the respondents' failure to grasp the significance of the McCarran-Ferguson Act. This is brought out sharply by the following statement on Page 9 in the brief in opposition:.

> That Act is directed to conflicts between state law and Acts of Congress....

This is a total misrepresentation of the McCarran-Ferguson Act. The Act is not simply a mere guide to construing statutes; it is a delegation by the Congress to the states of its constitutional power to regulate the business of insurance. The question presented is whether the federal courts may nullify state laws enacted to implement this delegated power. This is an important question of federal law that has not been, but should be, resolved by this Honorable Court. Therefore, the informative guidance of Supreme Court Rule 10 is eminently satisfied, contrary to the attempt by plaintiffs-respondents to obfuscate the matter by means of a procedural fog.

The plain facts of this case are that:

1. Against their will, the petitioners were placed in a plaintiff class in which they did not belong because they had known that a component of the products they purchased was life insurance. A form of notice was mailed out but it did not notify anyone in the United States, including petitioners, that they were class members (see petitioners' app. 39a)

2. Against their will, the petitioners were not permitted to name a class representative or a class co-counsel and thus were completely shut out of negotiations. It should be noted that the settlement called for payment of an attorneys fee to class counsel of $2,750,000.00, which perhaps accounts for their lack of objectivitity in interpreting rules, statutes, judicial decisions, and

events related to this case.

3. Against petitioners' will, the class representatives and the class counsel negotiated a settlement which bargained away petitioners' rights under Pennsylvania law and granted them no benefits in return because they could not certify that they had not known they were buying life insurance.

4. Against petitioners' will, a nationwide injunction was issued by a federal district court in Tampa, Florida purporting to prohibit petitioners from pursuing their rights in any other forum.

On top of all this, the brief in opposition for plaintiffs-respondents now claims that the petitioners have no standing to ask the Supreme Court to review this kind of treatment by the federal courts.

If this viewpoint were followed, there would be no justice for the petitioners anywhere in this land, and the Supreme Court would be powerless to rectify such an abuse of the federal judicial system.

The specific key words of Supreme Court Rule 10 are:

> ...a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court...

which is one of the indicators listed as among those factors that "indicate the character of the reasons the Court considers".

The respondents completely misrepresent the gist of Supreme Court Rule 10, which clearly embraces the instant case.

On page 10, respondents assert that:

> "This Petition is pursued for the individual benefits of the Petitioners, who did not timely opt out of the settlement in order to pursue individual claims."

In the first place, petitioners made it abundantly clear to both the district court and the negotiating parties that petitioners did not want to be part of the main **Horton** plaintiff class and wanted to be severed or placed in a separate subclass so that their claims of improper sales practices in Pennsylvania could be resolved by the application of Pennsylvania law.

In the second place, the settlement and Claim Form approved by the district court excluded petitioners from class membership and any benefits of the settlement. This was because the types of improper sales practices in Pennsylvania were distinctly different from those in Florida. A prerequisite to class membership and collecting benefits as a member of the **Horton** class was a certification that the claimant was unaware that the product was insurance. Pennsylvania claimants could not make such a certification since part of the misrepresentations made to them was that insurance was a "component" of the product. How does one opt out of a class to which he has never belonged by definition or by eligibility for benefits?

All of the above demonstrates that respondents' mischaracterization lacks any legal or equitable foundation.

At pages 23-24, respondents assert that

> ...nor has the court's approval of the settlement of this case in any way infringed upon the states' ability to regulate insurance practices.

Respondents conveniently omit any reference to the nationwide injunction issued by the district court which purports to prohibit petitioners from invoking in their state courts the full panoply of insurance regulatory powers, both inherent and delegated by the Congress, held by their sovereign state of Pennsylvania. Respondents' assertions are entitled to no weight whatsoever.

The respondents are in error when, at page 8 of their brief in opposition, they assert that, because the petitioners are not named parties to the **Horton** class action suit, they lack standing to seek review.

It is instructive on this point to note **United Airlines, Inc. v. McDonald**, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed. 2d 423 (1977), which held that an unnamed absentee plaintiff class member in a Federal class action suit had timely filed a petition to intervene 18 days after the entry of final judgment by the U.S. district court.

The majority opinion stated, 431 U.S. at page 392, that:

> ...it would be circular to argue that unnamed member of the putative class was not a proper party to appeal...

Respondents compound their fallacious and distorted misinterpretation of petitioners' position at page 26, as follows:

> Petitioners seek to rely upon this Court's emphasis in **Seminole Tribe** that the sovereignty of the states must be maintained and generically apply that emphasis to its argument that state sovereignty has been usurped by the Florida district court in violation of the McCarran-Ferguson Act. The **Seminole Tribe** decision and the case herein are not comparable. Petitioners mistakenly believe that the court's application of a Federal Rule of Civil Procedure can be violative of the McCarran-Ferguson Act.... The Act is directed to conflicts between state and federal law (Acts of Congress) as to the business of insurance and the preemptiveness of federal law under those circumstances.

This is a blatant misinterpretation of the McCarran-Ferguson Act, which says nothing about the preemptiveness of federal law under any circumstances.

The truth is that the McCarran-Ferguson Act is oriented against federal preemptiveness by an Act of Congress let alone by a Federal Rule of Civil Procedure.

At page 27, respondents come right out and say it:

> The district court herein considered federal principles governing approval of class action settlement, not the assessment of specific damages under Florida or any other state law.

Thereby, respondents explicitly admit that the district court completely junked state sovereignty and the McCarran-Ferguson Act's mandate to apply state law and instead applied a federal procedural rule.

CONCLUSION

The brief in opposition of the plaintiffs-respondents mischaracterizes the motives of the petitioners; misconstrues the

relevant rules, statutes, and judicial decisions; misinterprets the course of events in the courts below and arrives at predictably erroneous conclusions. The petition for a writ of certiorari raises the important question as to whether compliance with federal procedural rules relieves federal courts from applying any state laws at all, particularly in regard to improper practices carried on in the business of insurance; the petition for a writ of certiorari should be granted.

Respectfully submitted,

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